Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

JOSE ALVAREZ, et al.,

Petitioners,

- versus -

DADE COUNTY, FLORIDA,
a political subdivision,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER, AS HELD BY THE ELEVENTH CIRCUIT COURT OF APPEALS IN *DADE COUNTY, FLORIDA v. JOSE ALVAREZ, et al.,* 124 F.3D 1380 (11TH CIR.1997), A FINDING OF FACT BY THE JURY AND A DECISION AS A MATTER OF LAW BY THE JUDGE AS TO THE EXISTENCE OF COMPENSABLE WORK UNDER THE FAIR LABOR STANDARDS ACT CAN BE OVERTURNED IN THE ABSENCE OF A LEGAL BASIS FOR SUCH ACTION?

II.

WHETHER THE FLUCTUATION IN PROCEDURES UTILIZED BY THE CIRCUITS IN DETERMINING COMPENSABLE WORK UNDER THE FAIR LABOR STANDARDS ACT HAS CIRCUMVENTED THIS COURT'S RULING IN *SKIDMORE v. SWIFT,* 323 U.S. 134 (1944), AND ERODED THE NOTION OF *STARE DECISIS*?

III.

WHETHER THE CONFUSION AMONG THE CIRCUITS IN CASES INVOLVING DETERMINATIONS OF COMPENSABLE WORK UNDER THE FAIR LABOR STANDARDS ACT HAS IMPEDED THE RIGHT TO A TRIAL BY JURY PURSUANT TO THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

PARTIES TO THE PROCEEDING

The parties to the proceedings are as follows:

Plaintiffs - Appellees - Petitioners:

Jose M. Alvarez, Andrew Benjamin, Glen Blondun, Ted Bradley, Peter Caroddo, Francis X. Carollo, Paul Chahal, Joseph Derringer, Raul Escobar, Dexter E. Fletcher, Victor M. Gatell, Jr., Terence Gontko, Clayton Gonzalez, Elio Gonzalez, Donald G. Green, Richard Hansen, Felix Hechavarria, Calvin James, Mike M. Kirkland, Greg J. Kral, Jeff Lampert, Gary R. Lefebvre, Felix Marrero, Ray Melcon, Steven Mesa, Humberto Perez, Lazaro Picallo, Michael E. Preston, Charles Ritthaler, Hector Rivera, Augustine Roman, Rodney Sanchez, Robert Sanger, and Alberto Somoano.

Defendant - Appellant - Respondent:

Dade County, Florida, a Political Subdivision.

Amicus Curiae

Florida Sheriff's Association through the filing of an Amicus brief in the Eleventh Circuit.

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Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on October 16, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit reported at *Dade County, Florida v. Jose Alvarez, et al.*, 124 F.3d 1380 (11th Cir.1997) is set forth in Appendix A to this Petition. (App. A, infra. pp. A 1-A 10). The order of the Court of Appeals denying rehearing and suggestion of rehearing en banc is not yet reported and is set forth in Appendix B and Appendix C to this Petition. (App. B & C, infra. pp. B 11-C 12).

There has been no formal opinion entered by the district court for the Southern District of Florida. The order of the district court on January 29, 1996, entering corrected final judgment in favor of the Plaintiffs, appears in Appendix D to this Petition. (App. D, infra. pp. D 13-D 15).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit setting aside the corrected final judgment was entered on October 16, 1997. (App. A, infra. pp. A 1-A 10). A timely petition for rehearing and suggestion of rehearing en banc was denied on January 7, 1998. (App. B & C, infra. pp. B 11 - C 12). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION, STATUTORY PROVISIONS, AND REGULATIONS INVOLVED

Constitutional Provision:

The Seventh Amendment to the United States Constitution provides in relevant part:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Statutory Provisions:

The statutory provisions involved are set forth in pertinent part in Appendix P, infra. pp. P 54-P 56. The statutory provisions are:

> 28 U.S.C. § 1292, 29 U.S.C. § 201, 29 U.S.C. § 207, 29 U.S.C. § 251, and 29 U.S.C. § 254.

Regulatory Provisions:

The regulatory provisions involved are set forth in pertinent part in Appendix Q, infra. pp. Q 57-Q 63. The regulatory provisions are:

> 29 C.F.R. § 785.1, 29 C.F.R. § 785.2, 29 C.F.R. § 785.3, 29 C.F.R. § 785.6, 29 C.F.R. § 785.7, 29 C.F.R. § 785.11, 29 C.F.R. § 785.12, 29 C.F.R. § 785.13, 29 C.F.R. § 785.24, 29 C.F.R. § 785.25, 29 C.F.R. § 785.27, 29 C.F.R. § 785.28, 29 C.F.R. § 785.29, and 29 C.F.R. § 785.30.

Federal Rules of Civil Procedure:

The Federal Rules of Civil Procedure involved are set forth in pertinent part in Appendix O, infra. pp. O 52-O 53. The Federal Rules are:

> Federal Rule 49(a), Federal Rule 50(b), and Federal Rule 56(c).

STATEMENT OF THE CASE

A. INTRODUCTION:

This case presents the Court with the opportunity to correct the erroneous decision of the Eleventh Circuit as well as to definitively establish a standard upon which the circuits can evaluate claims set forth pursuant to the Fair Labor Standards Act (FLSA). At this juncture, the integral component absent from the implementation of a consistent standard is the inability to fashion a definition of "work" for purposes of determining entitlement to compensation under the FLSA. Procedural and substantive confusion among the circuits have manifested because of the lack of a uniform definition of "work" and the problems inherent in attempting to implement a test for determining the existence of "work" without a definition of the term. This problem carries over to the remainder of the gambit of jurisprudence by blurring the clearly delineated role of the judge as the trier of law and the jury as the finder of fact thereby compromising the right to a trial by jury guaranteed by the Seventh Amendment and eroding the principle of *stare decisis* in FLSA compensable work cases.

The contention of a gambit of problems in the procedural and substantive implementation of the FLSA for purposes of determining compensable work is illustrated in the case at hand. In this case, current and former members of the Metro-Dade Police Department's (MDPD) Special Response Team (SRT) brought an action against Dade County for its failure to compensate the members of SRT for off-duty time spent engaging in physical training. The claim was premised on the notion that the Department should be required to compensate the SRT officers because Dade County required SRT officers to engage in such physical training during off-duty hours so as to enable the SRT officers to meet and maintain the level of physical fitness required to perform SRT functions. After a trial lasting more than a week, a review of all the facts, and following a special jury verdict, the district court entered a Corrected Final Judgement as to Liability. The district court ruled as a matter of law that Dade County had violated the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 *et seq.*) by wilfully failing to compensate members of the Metro-Dade Police Department's Special Response Team for the performance of required physical training and exercise before and after SRT members' regular shifts

because such training constitutes compensable work under the FLSA. In lieu of the fact that the district court followed the applicable law as set forth under *Birdwell v. City of Gadsden, Ala.*, 970 F.2d 802, 807 (11th Cir.1992), the decision of the district court was reversed in a scathing Eleventh Circuit opinion. It is essential to review the procedural history below to fully comprehend the procedural and substantive issues presented in this case which illustrate the need for intervention in the form of a modern day standard for determining the existence of "compensable work" in FLSA cases.

B . THE RELEVANT FACTS:

1. Overview of the case:

This action was brought by thirty-four current or former members of the Metro-Dade Police Department's Special Response Team (SRT) for compensation pursuant to the FLSA for time spent engaging in off-duty physical training necessary to meet the heightened demands required of SRT members. The SRT is a specialized unit of the Metro-Dade Police Department deployed to assist police department personnel and other government agencies in high-risk, life threatening situations. (R2-85). Some of the high-risk calls SRT members are summoned to respond to include high-risk search and arrest warrants, barricaded subjects, sniping incidents, and dignitary protection assignments. (R2-86).

One of the aspects that makes the SRT unit unique is the heightened physical demands required of its members. Because the nature of the SRT duties demands extreme physical exertion, "it is undisputed that a certain level of physical fitness is necessary for individuals assigned to the SRT." (App. F, infra. p. F 18).

Physical demands placed on SRT officers are intense. Such demands are placed on the officers prior to acceptance as a member of the Special Response Team and remain consistent while assigned to the unit. The MDPD requires its SRT applicants and officers to be in excellent physical condition. Applicants for an SRT position

> were expected to meet these physically demanding requirements from the day they began working and to maintain their physical abilities as long as they remained in the unit. (R2-86).

In recognition of the fact that many of the SRT functions demand extreme physical exertion to satisfactorily resolve the incident

> the County further required that its SRT officers pass a physical performance test semi-annually. In order for [members] to possess and maintain this required level of physical fitness and capacity to do their jobs and to pass the semi-annual physical performance test, SRT members must train ten (10) hours each week. (R2-85).

So as to facilitate the mandatory level of physical ability required of SRT members, provisions were implemented to allow SRT members to engage in physical training on-duty. SRT members were instructed and required to train on-duty during the work shift for two weeks out of every four week period. At that time, SRT duties were divided in four week increments with two weeks allocated for tactical training and two weeks allocated for warrants. During the two week tactical training period, SRT members were instructed to engage in physical training on-duty and were compensated for such time. As reflected in a Memorandum from the Director of the Metro-Dade Police Department

> the utilization of any departmental or other fitness facilities . . . will only be used during off-duty hours. [T]he single EXCEPTION will be the Department's Special Response Team, due to the nature of their assignment . . . may participate in tactical/fitness training on-duty while in their two-week SRT tactical/training cycle. (App. T, infra. p. T 68).

In response to the issue of whether continuous training is necessary in order for SRT members to maintain the required level of fitness, several experts conducted studies which resulted in the determination that "without a minimum number of hours regularly spent on physical training, people who train physically go through 'detraining.'" (App. F, infra. p. F 19). Because the Department failed to provide SRT members with the means to train on-duty during the two week warrant cycle, SRT members were required to train off-duty in order to maintain the required level of fitness identified by various expert studies. (App. U, infra. p. U 69). SRT

members were instructed to take such steps to maintain the required level of fitness off-duty by the command staff, who told SRT applicants and SRT members "that they would have to do 'whatever it takes' to get in shape and remain in shape." (R2-87).

The command staff of the Special Response Team recognized the dire necessity of consistent and vigorous training required of the SRT members and communicated this need to the Director of the Metro-Dade Police Department. When faced with the possibility of a reduction in the on-duty time allocated for physical training, the SRT command staff informed the Director that

> [i]n order to obtain the level of physical fitness mandated by their assignment, our personnel must continually train. The entire SRT supervisory staff agrees that the gradual reduction in training opportunities will eventually negatively impact the officers' performance during high profile missions. (App. V, infra. pp. V 72- V 73).

Clearly the MDPD not only wanted the SRT officers to be in the physical condition it had mandated as necessary to perform the functions unique to the SRT unit, but had made that heightened level of physical fitness a job requirement and integrated such mandate into the Metro-Dade Special Response Team Standard Operating Procedure N. (App. S, infra. p. S 66). Although the Department clearly required a heightened level of physical fitness for SRT unit members and instructed SRT members to engage in such physical training off-duty to maintain that required level, the Department is unwilling to compensate the SRT members for that time.

2. Proceedings Below:

Petitioners, current and former members of the Metro-Dade Police Department's Special Response Team (SRT), brought a cause of action against Dade County to recover overtime pay for their off-duty physical fitness training. Petitioners filed their original suit on April 5, 1994. (R1-1). By order dated November 30, 1994, the district court granted Petitioners' motion for leave to file their second amended complaint. (R1-27).

Prior to the start of the trial, there was substantial pretrial litigation. One matter of significance involves a Motion in Limine filed by the Defendant requesting that the court take judicial notice of a letter written by the Wage and Hour Administrator of the Department of Labor (DOL) in response to a factual inquiry submitted by a police department unaffiliated with this case. On November 2, 1995, the district court entered an order denying Defendant's motion. (App. G, infra. p. G 25). The court noted in its order that, although the Defendant consistently refers to the DOL letter "as a 'decision,'" "[I]t is a letter, responding to a fact-specific inquiry by unnamed parties and is intended to answer questions posed by such parties." (App. G, infra. p. G 26). As such, the court entitled the document "an opinion letter" and ruled it inadmissable as evidence. (App. G, infra. p. G 26). Subsequently, the issue of the letter resurfaced during the trial when the Defendant asserted that "the DOL issued an opinion which can be construed to say that the DOL considers 'voluntary exercise at home' to not be compensable under FLSA." (App. F, infra. p. F 23). The court responded to that contention by pointing out that the DOL letter

> [d]oes not relate to SRT members who are required to pass a physical fitness test to maintain their jobs and who are compensated for working out during certain on-duty hours. (App. F, infra. p. F 23).

The court further notes that a DOL letter is a non-binding authority on the court. (App. F, infra. p. F 23).

The trial on liability commenced on November 6, 1995 and concluded on November 17, 1995, with a jury verdict for the Petitioners. (R7 to R16). Prior to the submission of the case to the jury, Defendant moved for summary judgment pursuant to Federal Rules of Civil Procedure Rule 56(c). The district court, in its order denying Defendant's motion entered April 25, 1995, stated that

> [t]he court will leave it to the jury to determine whether a particular set of facts exist in this case . . . before deciding whether those facts give rise to liability under the F.L.S.A. (App. F, infra. pp. F 22-F 23).

The case was then submitted to the jury. The jury made a factual determination and rendered a special verdict finding that

> (1) Plaintiffs' off-duty physical training is required or controlled by the County; (2) Plaintiffs' off-duty physical training is performed predominately for the benefit of the County; (3) Plaintiffs' off-duty physical training is an integral or indispensable part of their principal activities as SRT officers; and (4) Dade County either knew, or showed reckless disregard, that its conduct violated the FSLA. (App. L, infra. pp. L 41-L 42).

The district court, having heard the facts and with the assistance of the special jury verdict, issued its Corrected Final Judgment as to Liability on January 29, 1996, ordering and adjudging as a matter of law that:

> (1) Plaintiffs' off-duty physical training is compensable work as that term is contemplated under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*.
>
> (2) Defendant Dade County wilfully violated the FLSA, 29 U.S.C. § 255.
>
> (3) The County has violated the collective bargaining agreements entered into between the Police Benevolent Association and the County by failing to pay Plaintiffs for their off-duty physical training. (App. D, infra. pp. D 13-D 15).

The case was bifurcated as to liability and damages. Upon entry of final judgment finding that the off-duty physical training of SRT officers is compensable work for purposes of FLSA and that the County wilfully violated the Act, the Defendant renewed its 50(b) motion or, alternatively, moved for certification to appeal pursuant to 28 U.S.C. § 1292(b). As grounds for the motion, the County asserted the following:

(1) Based on the facts and circumstances established at trial, the Plaintiffs' off-duty exercise does not constitute work compensable under the Fair Labor Standards Act, 29 U.S.C. § 216(b), as a matter of law;

(2) There is no sufficient evidentiary basis for a reasonable jury to determine that the County required or controlled the Plaintiffs' off-duty exercise;

(3) There is no sufficient evidentiary basis for a reasonable jury to determine that the Plaintiffs' off-duty exercise was performed predominantly for the benefit of the County; and

(4) There is no sufficient evidentiary basis for a reasonable jury to determine that the Plaintiffs' off-duty exercise was an integral part of their principal employment.

In the order entered February 14, 1996, denying Defendant's Renewed Motion for Judgment as Matter of Law, the district court addressed the grounds set forth in Defendant's motion as follows:

- As to the argument that no reasonable juror could find for the Plaintiffs, the district court noted that

> The basis for this aspect of the motion, according to Defendant, is not that no reasonable juror could find for Plaintiffs, as is the usual form of argument in motions such as these. On the contrary, Defendant seems to admit, and voice substantial concern, over its belief that too many juries could find for Plaintiffs in like situations. The court points out to Defendant that the alleged 'unavoidable vagaries' of the jury system cannot be, in any way, a basis for denying Plaintiffs judgment in this case. (App. N, infra. p. N 47).

> As to the contention that the proper procedure was not implemented in determining that Plaintiffs' off-duty physical training constitutes compensable work for purposes of FLSA, the Defendant claims that "whether a certain set of facts and circumstances constitute work for purposes of FLSA is a question of law" and, as such, the Defendant argues "[i]t is for the court to determine in the first instance if a set of facts gives rise to liability." The district court determined, "based on its interpretation of applicable case law, that the proper procedure in this case was to submit to the jury certain factual issues." (App. N, infra. pp. N 47-N 48). In this case, the factual issues were submitted to the jury as agreed to by the parties in the form of a special verdict. In submitting a special verdict to the jury asking whether certain facts exist, the court went on to state that it
>
> > has completely satisfied the burdens imposed by *Birdwell* which provides that 'it is for the jury to determine if . . .facts exist' sufficient for the Court to determine liability. (App. N, infra p. N 48).

As such, the district court stated that it fully understood its role in such cases, and that the court had taken the correct steps to assure a legally sound ruling.

After denying the Defendant's Motion for Judgment as a Matter of Law, the district court granted the portion of Defendant's motion requesting certification to appeal the issue raised in the motion pursuant to 28 U.S.C. § 1292(b). In granting the Defendant's request for certification of the issue, the district court reiterated its contention that the proper procedural steps consistent with *Birdwell* were followed in this case, but also recognized that "substantial debate exists as to whether this procedure is appropriate given the nature of the claim." (App. N, infra. pp. N 49-N 50). Although the district court fashioned its procedure

> [B]ased on current case law and the direction of the Court of Appeals in *Birdwell* . . . and is confident that the procedure comports with applicable legal standards . . . given that *Birdwell* did not unequivocally spell out the manner in which district

> courts were to separate factual determinations from legal, excluding the damages issue, there is the possibility that other courts may decide this issue in other ways. (App. N, infra. p. N 50).

As such, the district court concluded that the issue presents a "controlling question of law" for which a "substantial ground for difference of opinion" exists. (App. N, infra. p. N 49).

Inexplicably, the Eleventh Circuit, without the advantage of having conducted the trial or hearing the facts, reviewed the case *de novo,* reversed the judgement of the district court and remanded the case for entry of judgement in favor of Dade County. The Eleventh Circuit, although inconsistent with its final determination reversing the judgment as to liability entered by the district court, states

> The question of whether a particular set of facts and circumstances constitutes work under the FLSA is a question of law. *Birdwell,* 970 F.2d at 807. As we stated in *Birdwell,* '[i]t is for the court to determine if a set of facts gives rise to liability; it is for the jury to determine if those facts exist.' *Birdwell,* 970 F.2d at 808. The County is thus entitled to judgement as a matter of law if the facts, as interpreted in the light most favorable to the SRT officers, afford no basis for finding that their off-duty exercise constitutes work for the purposes of the FLSA. *Alvarez,* 124 F.3d at 1383.

Petitioners filed a Petition before the Eleventh Circuit for rehearing and suggestion of rehearing *en banc* which was denied.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS A QUESTION OF NATIONAL IMPORTANCE AS TO THE PROPER DEFINITION OF WORK AND THE PROCEDURE FOR MAKING COMPENSABLE WORK DETERMINATIONS IN FLSA CASES.

A. THE QUESTION OF WHAT IS "COMPENSABLE WORK" AND THE PROPER PROCEDURE FOR MAKING COMPENSATION DETERMINATIONS IN FLSA CASES IS A QUESTION OF FEDERAL LAW OF NATIONAL IMPORTANCE IN NEED OF RESOLUTION FROM THE SUPREME COURT.

• *Work is not clearly defined for purposes of compensation determinations under the FLSA as illustrated by the present case.*

The definition of "compensable work" has long been an evasive and problematic issue. From the time of the enactment of the FLSA to the present, the courts and the legislature have been struggling to promulgate a definition of "work" comprehensive enough to meet the needs of the times and restrictive enough so as not to open a floodgate for FLSA compensation claims. The text of the Eleventh Circuit's decision in *Birdwell* exemplifies some of the ambiguity in existence pertaining to this problem. On one hand, the Eleventh Circuit states that "[W]hether a certain set of facts and circumstances constitute work for the purposes of the FLSA is a question of law." *Birdwell,* 970 F.2d at 807, *(quoting Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671 (5th Cir.1991)(en banc)). The Eleventh Circuit, in the same opinion, goes on to state that

> Certain sets of facts, if found by a fact finder, will give rise to liability under the FLSA while other sets of facts will not. It is for the court to determine if a set of facts gives rise to liability, it is for the jury to determine if those facts exist. *Birdwell,* 934 F.2d at 808.

The obvious problem is the ambiguity as to the components necessary for the facts to rise to the level of "work" for compensation purposes under the FLSA. The problem is further compounded by the lack of clarity as pertains to whether the determination should be made by the judge or the jury.

Although a handful of cases over the years have set forth partial definitions of "work" in the context of that era, nowhere is there a clear definition of what work is in the modern day context.

In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, etc., et al.*, 321 U.S. 698 (1944), this Court defined work generally as "[p]hysical or mental exertion, whether burdensome or not, controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal,* 321 U.S. at 703. (*See also* 29 U.S.C. §§ 203 (g, j), 207(a)). However, in the *Tennessee Coal* case, this Court stated that it was not guided by any precise statutory definition of work or employment. *Tennessee Coal,* 321 U.S. at 702.

The difficulty expressed by this Court in the *Tennessee Coal* case is further substantiated by the text of the FLSA and the Code of Federal Regulations (CFR). The problems encountered in attempting to define work are clearly illustrated in provision 29 U.S.C. § 201 *et sec.* of the FLSA and provisions 29 C.F.R. § 785.1 through 29 C.F.R. § 785.29 of the CFR pertaining to the FLSA. These provisions attempt to set forth piecemeal definitions of certain tangential concepts related to work without actually providing a concrete definition of the term.

Although the provisions and the case law support a pro-employee position as pertains to compensation, the situations addressed by the courts and the legislature are difficult to resolve by today's standards. Expressing a pro-employee position in a case involving an attempt to determine if workers were to be compensated for travel to and from a mine shaft, this Court in *Tennessee Coal,* stated

> [S]uch an issue can only be resolved by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion. *Tennessee Coal,* 321 U.S. at 700.

When faced with cases turning on the question of whether certain actions equate compensable work, the courts today have no specific standard upon which to base the determination. This lends itself to inconsistent results and substantive and procedural fragmentation between the circuits.

At the same time, demands upon the work force have heightened the importance of establishing a definition of work amenable to application consistent with the evolving times. Since work is no longer a concept limited to a function performed eight hours a day on the premises of the employer, society is in need of a definition of "compensable work" so as to put employees and employers on notice as to corresponding rights and obligations under the FLSA. As the times are changing, employees are working in ways as never before. Employees held to their employer's deadlines and demands often work at home, in airport terminals, on airplanes, and in gyms while performing physical conditioning and training. Employers often care only about the bottom line that the job gets done, whether it is to finish a report or to assure a specific level of fitness. Technology has accelerated this evolution, but both the legislation and the courts have not met the pace of this quickly evolving phenomenon. Clearly the end product, a finished report or a specified level of fitness, was created by work and was for the benefit of the employer. However, the lack of a concrete definition and a procedure upon which to evaluate such facts often results in inconsistent and inequitable outcomes.

A perfect illustration of this problem is the events that transpired throughout the course of litigation concerning claims by members of the Metro-Dade Police Department's Special Response Team who were not compensated for specific work performed because of the inconsistencies in the definition of work and the lack of a proper procedure for making the determination as to whether a particular set of facts constitutes "compensable work" under the FLSA. The determination by the Eleventh Circuit that such required off-duty training does not constitute compensable work contravenes the legislative intent behind the enactment of the FLSA.

B. THE DESIGNATION OF THE JURY AS THE FINDER OF FACT AND THE JUDGE AS THE TRIER OF LAW HAS BEEN CIRCUMVENTED IN FLSA COMPENSABLE WORK CASES RESULTING IN CONFUSION AMONG THE CIRCUITS, MISINTERPRETATION OF THIS COURT'S DECISION IN *SKIDMORE v. SWIFT*, AND INFRINGEMENT UPON THE SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY.

1. The impact on national policy.

Case precedent and the right to a trial by jury are two of the most fundamental aspects of the American judicial system. Therefore, it is necessary that this case be reviewed by this Court to determine what precedential value it will have in later cases arising under like circumstances and to preserve the right to a trial by jury.

a. Case precedent. *Stare decisis* means that like facts will receive like treatment in a court of law. *Brock* v. *El Paso Natural Gas Co.*, 826 F.2d 369, 374 (5th Cir.1987). Of paramount importance is the issue of whether the determination regarding the existence of compensable work is one to be made by the judge or the jury.

b. The right to trial by jury. In addition to the fundamental principle of case precedent is the right to a trial by jury pursuant to the Seventh Amendment of the United States Constitution.

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law. *U.S. Const. amend. VII.*

It is clear that the rule created by the Eleventh Circuit in this case virtually eliminates the right of the Petitioners to a trial by jury. The possibility of this equates not only to a travesty of justice and the undermining of the American judicial system, but also has the potential effect of eliminating the right to a trial by jury for all subsequent causes of action set forth under the FLSA.

2. Inconsistency among the circuits as to the proper procedure for determining compensable work has resulted in the utilization of procedures in conflict with prior Supreme Court rulings.

SUPREME COURT:

- *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

In *Skidmore*, this Court held that a determination as to whether work is compensable under the FLSA is too fact-based to establish a legal formula.

> We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. *Skidmore*, 323 U.S. at 136.

As such, this Court recognized that the determination as to whether work is compensable under the FLSA is to be made by the trial court. Because the determination is fact-based, a rule was not set forth pertaining to how such a determination is to be made. This Court held "[w]hether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court." *Skidmore*, 323 U.S. at 136.

The circuits are unclear as to the role of judge and jury in such cases because of the absence of a definitive standard. This has resulted in a split between this Court and the circuits on this matter as illustrated by the following:

FIFTH CIRCUIT:

• *Bright* v. *Houston Northwest Medical Center Survivor, Inc.*, 888 F.2d 1059 (5th Cir.1989).

In *Bright*, the court construed *Skidmore* as mandating that the determination as to whether on-call time is work for purposes of FLSA is a question of fact that would always preclude summary judgment. However, that contention was clarified by the en banc decision which held that a directed verdict or summary judgment is proper when there are no disputed facts. *Bright*, 934 F.2d at 674 (en banc).

• *Allen* v. *Richfield, Co.*, 724 F.2d 1131 (5th Cir.1984).

In *Allen*, evidence was submitted to the jury as to the factual question of whether off-duty time constituted work time. The Fifth Circuit upheld a jury verdict, finding that off-duty time was not work time. *Allen*, 724 F.2d at 1137.

ELEVENTH CIRCUIT:

The cases of this circuit are not only in conflict with *Skidmore* and the other circuits, but are also intrinsically inconsistent with one another as demonstrated by the following decisions:

• *Birdwell v. City of Gadsden, Ala.*, 970 F.2d 802, 807 (11th Cir.1992).

In *Birdwell,* the Eleventh Circuit concluded that

> [T]he Supreme Court left to the lower courts to trace the exact contours of what types of on-call time are compensable by the Act. Thus, a claimant under the FLSA must make out a prima facie case before the jury can determine the factual issues. *Birdwell,* 970 F.2d at 808.

However the Eleventh Circuit went on to state in *Birdwell* that the role of the jury as fact finder is proper in cases brought under the FLSA, and "[W]e will uphold a jury verdict if there is probative evidence to support the verdict." *Birdwell,* 970 F.2d at 807, *(quoting Lane Crane Service, Inc. v. Int'l Brotherhood of Electrical Workers*, 704 F.2d 550 (11th Cir.1983)). In furtherance of the proposition that a jury is a proper finder of fact in cases brought under the FLSA, the *Birdwell* court stated

> [s]o long as the jury is properly instructed as to the law, the verdict must stand unless no reasonable jury could reach such a conclusion as a matter of law. *Birdwell,* 970 F.2d at 807, *(quoting Nash v. Duval County,* 763 F.2d 1393, 1397 (11th Cir.1985)).

• *Dade County, Florida v. Jose Alvarez, et al.*, 124 F.3d 1380 (11th Cir.1997).

In this case, the Eleventh Circuit produced an even more confusing result. First, the Eleventh Circuit cites *Birdwell* and states "[a]s we stated in *Birdwell*, '[i]t is for the court to determine if a set of facts gives rise to liability; it is for the jury to determine if those facts exist.'" *Birdwell,* 970 F.2d at 808. Then in contradiction, the Eleventh Circuit holds that a jury, after hearing all the facts and

rendering a special verdict based upon a stipulated special verdict form, could not have been "reasonable" in its determination.

This result was reached by the Eleventh Circuit in lieu of the district court's observation that:

> Defendant [Dade County] seems to admit, and voice substantial concern, over its belief that too many juries could find for Plaintiffs in like situations. As Defendant states, 'If juries throughout the country are allowed to answer such questions, there would be no guarantee of consistency. [M]ajor differences in employer costs could arise based solely on the unavoidable vagaries of the jury process.' (App. N, infra. p. N 47).

Therefore, it is apparent that Defendant would have the court deny the right to a trial by jury in such cases to workers seeking relief under the FLSA.

In response, the district court points out to the Defendant

> [t]hat the alleged "unavoidable vagaries" of the jury system can not be, in any way, a basis for denying Plaintiffs judgement in this case. As triers of fact, juries must be given the opportunity to decide each case, as it is presented, and decide whether sufficient facts exist for the Court to consider whether a subject activity may be considered work under the FLSA. As such, the Court rejects this aspect of Defendant's argument. (App. N, infra. p. N 47).

II.

CERTIORARI SHOULD BE GRATED BECAUSE THE COURT OF APPEALS' DECISION IS CONTRARY TO THIS COURT'S PRIOR DECISIONS UNDER THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 201 _et seq._, THEREBY CREATING INCONSISTENCIES AMONG THE CIRCUITS CONCERNING THIS IMPORTANT PUBLIC POLICY ISSUE.

A. THE ELEVENTH CIRCUIT HAS IMPLEMENTED INCONSISTENT TESTS FOR DETERMINING "COMPENSABLE WORK" UNDER THE FLSA THEREBY CREATING A FORUM FOR PROCEDURAL DISPARITY, DIFFERING OUTCOMES, AND INEQUITABLE RESULTS.

3. The substantive and procedural components utilized in reaching FLSA "compensable work" determinations as set forth by the Eleventh Circuit in Birdwell.

a. The substantive test for compensable work as set forth by the Eleventh Circuit in *Birdwell*.

In a case involving on-call time, the court in *Birdwell* noted that the determination as to whether on-call time spent waiting is compensable under FLSA is based on whether the "time is spent predominantly for the employer's benefit or for the employee's." *Birdwell*, 970 F.2d at 807, (*quoting Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944)). The determination as to whether on-call time spent waiting constitutes compensable work depends on the degree to which the employee may use the time for personal activities. *Birdwell*, 970 F.2d at 807, *(quoting Skidmore*, 323 U.S. at 138).

b. The procedural implementation of the substantive test of compensable work under the FLSA as set forth by the Eleventh Circuit in *Birdwell*.

In *Birdwell*, the court recognized that

> [U]nder certain sets of facts, on-call time could be working time under the FLSA, and since the court could not set down a 'single legal formula to resolve all cases,' the Court directed the lower courts to examine the particular facts in each case. *Birdwell*, 970 F.2d at 808, *(quoting Bright*, 934 F.2d at 675).

Although the court in *Birdwell* noted that "Whether a certain set of facts and circumstances constitutes work for purposes of FLSA is a question of law," *Birdwell*, 970 F.2d at 807, *(quoting Bright*, 934 F.2d at 671), the court further states that

> [C]ertain sets of facts, if found by a fact finder, will give rise to liability under the FLSA while other sets of facts will not. It is for the court to determine if a set of facts gives rise to liability; it is for the jury to determine if those facts exist. *Birdwell,* 970 F.2d at 808.

2. *The substantive and procedural components utilized in reaching FLSA "compensable work" determinations as set forth by the district court.*

a. The substantive test for compensable work as set forth by the district court in this case:

Work under the FLSA includes all activities which are required or controlled by the employer and which are performed primarily for the benefit of the employer.

(1) PRONG ONE: The activity must be required or controlled by the employer. (App. J, infra. p. J 36).

• For an activity to be controlled by the employer, the employer must determine the type of activity that is performed and the time, place, and manner in which the activity is performed. (App. J, infra. p. J 36).

• An activity may be considered required by the employer if it suffered or permitted such activity to occur. (App. J, infra. p. J 36).

• Work is "suffered" or "permitted" when the employer knows or has reason to believe that an employee is or was working overtime and the activities performed are an integral and indispensable part of the employee's principal activities. It is the responsibility of the employer to see that the activity is not performed if he does not want it to be performed. (App. J, infra. pp. J 36-J 37).

• The term "principal activity" includes all activities which are an integral part of performing the employee's job, those clearly related activities which are indispensable to its

performance and tasks incidental to them, as well as those activities made necessary by the nature of the work performed. An employee may engage in more than one principal activity during the workday. An activity need not predominate over all (other) activities to be considered a principal activity, nor must it occur during normal working hours. The fact that an activity occurs at home or outside the workplace does not preclude that activity from being considered as a principal activity. (App. J, infra. p. J 37).

• Activities which are an "integral or indispensable" part of the principal activity are those without which it would not be possible to carry out the principal activity to which they are related. (App. J, infra. p. J 37).

(2) PRONG TWO: The activity is performed for the benefit of the employer. (App. J, infra. p. J 37).

• An activity is predominantly for the benefit of one party if it benefits that party more than the other. (App. J, infra. p. J 37).

b. The procedural implementation of the substantive test for compensable work as set forth by the district court in this case:

• "This is the precise situation in which the Birdwell court envisioned a fact finder determining whether a set of facts exists." (App. F, infra. p. F 22).

> [T]he court will leave it to the jury to determine whether a particular set of facts exist in this case, i.e., whether Defendant requires Plaintiffs to work out on their own time and whether it is Defendant or Plaintiffs who benefit primarily from such workouts, before deciding whether those facts give rise to liability under the FLSA. (App. F, infra. p. F 22).

• Based on current case law, and the direction of the Court of Appeals in Birdwell, "[t]his Court fashioned its procedure, and is confident that the procedure comports with applicable legal standards." (App. N, infra. p. N 50).

3. *The substantive and procedural components utilized in reaching FLSA "compensable work" determinations as set forth by the Eleventh Circuit in this case.*

a. The substantive test for compensable work as set forth by the Eleventh Circuit in this case:

The Eleventh Circuit, in fashioning a test to determine if the facts presented in this case constitute work for purposes of FLSA, added additional elements beyond those set forth in the district court and other circuits for conducting the analysis. In this case, the Eleventh Circuit applied the additional requirements found in 29 C.F.R. § 785.27, which apply to lectures, meetings, and training programs. The text of 29 C.F.R. § 785.27, as well as the case of *Price v. Tampa Electric Company,* 806 F.2d 1551 (11th Cir.1987), clearly illustrates that the provision was not intended to be utilized in conjunction with the facts as set forth in the present case.

Along with addressing the questions of whether the activity is required or controlled by the employer and whether the activity is performed for the employer, the court also added the following four components of 29 C.F.R. § 785.27, Lectures, Meetings & Training Programs:

• attendance is outside the employee's regular working hours; and

• the employee does not perform productive work during the program; and

• attendance is voluntary; and

• the program is not directly related to the employee's job. *Alvarez,* 124 F.3d at 1387.

b. The procedural implementation of the substantive test for compensable work as set forth by the Eleventh Circuit in this case:

The Eleventh Circuit, citing *Birdwell*, reiterated that "[i]t is for the court to determine if a set of facts gives rise to liability; it is for the jury to determine if those facts exist." *Alvarez*, 124 F.3d at 1384. In lieu of this standard, the Eleventh Circuit reviewed the district court's denial of the County's motion for judgment as a matter of law *de novo* and determined

> [t]he County is entitled to judgment as a matter of law if the facts, as interpreted in a light most favorable to the SRT officers, afford no basis for finding that their off-duty exercise constitutes work for purposes of the FLSA. *Alvarez*, 124 F.3d at 1384.

B. SRT OFFICERS PERFORMED COMPENSABLE WORK UNDER ALL OF THE VARIOUS TESTS UTILIZED IN THE DIFFERENT ELEVENTH CIRCUIT CASES TO DETERMINE THE EXISTENCE OF "COMPENSABLE WORK" FOR PURPOSES OF THE FLSA.

1. Assuming the test as set forth in Birdwell is the proper test for determining whether a set of facts constitutes "compensable work" under the FLSA, the Plaintiffs in this case satisfied the test.

Although *Birdwell* involved an on-call issue factually distinguishable from the case at hand, applying the substantive test set forth under *Birdwell* for compensable work to this case results in the following:

> • While engaged in off-duty physical training, SRT members' time is spent predominantly for the employer's benefit as opposed to the benefit of the SRT members. The predominant benefit is bestowed upon the County because MDPD would not be able to maintain an SRT unit if the SRT members were unable to meet the rigorous demands of a unit established and maintained to assist members of the police department and other government entities during life-threatening situations.

• During the specific amount of time spent off-duty engaging in physical training for the purpose of meeting departmental requirements imposed solely on the SRT unit, the SRT members were not utilizing that time for personal activities. It is imperative to differentiate between physical training at a level and duration required for a particular job status as opposed to a leisure activity.

2. *Assuming the test as set forth by the district court in this case is the proper test for determining whether a set of facts constitutes "compensable work" under the FLSA, the Plaintiffs in this case satisfied all of the prongs of the test as illustrated by a special verdict returned by the jury and the finding as a matter of law entered by the judge.*

• SRT members' off-duty physical training was required by the County, as evidenced by the fact that the SRT members engaged in off-duty training to maintain the physical standards mandated by the Metro-Dade Police Department. (R2-87).

• Off-duty training conducted to maintain the required physical standards constitutes an integral part of performing the SRT job. The off-duty training is indispensable to the performance of the SRT job, in that the SRT members would not be able to perform the job without the requisite amount of off-duty training. The off-duty training is made necessary by the nature of the work performed by SRT members. (App. F, infra. p. F 18).

• Off-duty training was conducted primarily for the benefit of the Metro-Dade Police Department, because the benefit of the off-duty training which enabled the SRT members to perform the responsibilities of the SRT unit benefitted the County more so than the benefit bestowed upon the SRT members. Without adequately trained SRT members physically capable of performing SRT functions, the Department would not have a specialized unit available to assist police department personnel and other government agencies during life-threatening encounters. (App. V, infra. pp. V 72-V 73).

3. *Assuming the test as set forth by the Eleventh Circuit in this case is the proper test for determining whether a set of facts constitutes "compensable work" under the FLSA, the Plaintiffs in this case satisfied all of the prongs of the test.*

The following language quoted predominantly from the text of the Eleventh Circuit opinion clearly illustrates that the Plaintiffs satisfied every prong of the test applied in this case for determining whether off-duty training of SRT members equates to compensable work under the FLSA:

> • MDPD required the SRT members to engage in off-duty training to "maintain the physical fitness standards mandated by the police department." *Alvarez,* 124 F.3d at 1380. MDPD required that its tools, the physical fitness capabilities of the SRT officers, be sharp so that the MDPD could rest assured that the SRT unit was able to perform its highly specialized and unique functions.
>
> • Off-duty physical training of the SRT members is predominantly for the benefit of the county. Without physically fit officers capable of effectively performing the duties in the specialized unit of "assist[ing] departmental personnel and other government agencies during potentially life-threatening situations," the Department would not have the personnel capable of responding to such situations. *Alvarez,* 124 F.3d at 1381. Such physical training "[a]llows SRT officers to perform their core employment function of responding to emergency situations." *Alvarez,* 124 F.3d at 1387.
>
> • The off-duty physical training is an integral and indispensable part of the principal activity for which SRT members are employed. In fact, it was noted in the Eleventh Circuit decision that "[f]itness training must be undertaken off-duty in order to perform SRT functions." *Alvarez,* 124 F.3d at 1387. Additionally, since SRT call-outs
>
> > often require extreme physical exertion, involve serious risk to human life, and can last as long as twenty-four hours, '[g]ood physical fitness is recognized as a vital and

> necessary quality for individuals assigned to SRT.' *Alvarez,* 124 F.3d at 1381.

• Attendance at physical training was both during and after the SRT members' regular working hours. As noted by the court

> When on primary status, SRT officers were allotted two hours of on-duty physical fitness training each day, which they used to conduct long-distance runs, weight training and calisthenics. Prior to 1990, SRT members also were permitted to train on-duty twice a week for two hours during the warrant cycle. *Alvarez,* 124 F.3d at 1382.

• The Department maintained a past practice of requiring SRT members to engage in physical training while on-duty and expected and instructed them to continue to do so off-duty. (App. V, infra. pp. V 72-V 73).

• SRT members perform productive work during the time spent engaging in physical training. Physical training clearly constitutes productive work within the parameters of an SRT members' job description substantiated by the fact that the SRT members were mandated to engage in such activity while on-duty. (App. F, infra. p. F 23).

• Physical training is clearly an activity which is indispensable to SRT members' performance and is made necessary by the nature of the work performed. The Court states "[N]otwithstanding the restriction on on-duty training during the warrant cycle, SRT officers were expected to maintain their physical conditioning at all times." *Alvarez,* 124 F.3d at 1382.

• Attendance at physical training was not voluntary. Members of SRT were ordered to engage in physical training. The court recognized this requirement by including in the text of the opinion that

> [S]RT supervisors instructed officers that they had to stay in shape regardless of whether they had adequate on-duty training time . . . [I]n addition, expert witnesses testified that off-duty training was necessary during the warrant cycle because without it, officers would suffer de-training and lose the endurance and performance abilities necessary for the SRT assignment. *Alvarez*, 124 F.3d at 1382.

• Physical training is directly related to the SRT members' job. As recognized by the Eleventh Circuit,

> [O]nce members of the SRT, officers are frequently monitored to ensure that they are physically capable of performing SRT functions. *Alvarez*, 124 F.3d at 1381.

Further, the County required that the "SRT officers remained in adequate shape to perform SRT functions and pass the physical fitness exam." *Alvarez*, 124 F.3d at 1383.

Yet, in lieu of the above, the Eleventh Circuit concluded that the facts, viewed in a light most favorable to the SRT officers, "afford no basis for finding that their [SRT members'] off-duty exercise constitutes work for the purposes of the FLSA." *Alvarez*, 124 F.3d at 1385.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE OPINION OF THE ELEVENTH CIRCUIT COURT OF APPEALS SO FAR DEPARTS FROM THE ACCEPTABLE AND USUAL COURSE OF PROCEEDING AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

The Eleventh Circuit, in rendering its decision in this case, completely circumvented an entire body of case law and acceptable procedure in an effort to avoid the potential ramifications of inconsistent results creating a gambit of policy problems. As opposed to turning to binding Federal Statutes, Federal Regulations and case law, the court utilized fragments of various different tests

under the FLSA for determining "compensable work," a non-binding letter from the Wage and Hour Administrator of the Department of Labor factually distinct from the case at hand, and assumed the role of judge and jury in reaching an inequitable and legally inapposite outcome.

Although it is appropriate for a court to turn to rulings, interpretations, and opinions of the Department of Labor Administrator under the FLSA for guidance, it is clear that such information is non-binding in nature. In *Skidmore,* this Court recognized that

> [T]he weight of such a judgment in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. *Skidmore,* 323 U.S. at 140.

Instead of heeding the Supreme Court's guidance for evaluating the probative value of the DOL letter in this case, the Eleventh Circuit fashioned an entire decision upon the contents of a letter composed in response to a factual inquiry clearly distinguishable from the facts of this case. In doing so, the court failed to note the language at the end of the DOL correspondence that

> [T]his opinion is based exclusively on the facts and circumstances described in your [unknown police department] request and is given on the basis of your [unknown police department's] representation, explicit or implied, that you [unknown police department] have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. (App. R, infra. p. R 65).

Although the district court noted that there were significant factual differences evident between this case and the facts which served as

a basis for the DOL letter, these differences were overlooked by the Eleventh Circuit. In relying on all of the tangential information such as the DOL letter and inapplicable standards, the court overlooked the fact that all of the elements required to establish compensable work are present in this case. In fact, all of the components of the substantive test for compensable work set forth by the Eleventh Circuit are satisfied by the very language contained in the text of the opinion.

After an eight-day trial on the merits, the agreement of both sides to the utilization of a special verdict, factual findings of the jury, and a determination as a matter of law by the judge, it is incomprehensible that the Eleventh Circuit could intervene at this stage and proffer that, in viewing all of the facts in a light most favorable to the SRT members, no reasonable jury could have reached such a conclusion. Not only does this undermine the entire jury process and infer that the jurors in this case lacked "common sense," but it is a direct reflection on the competency of a senior district court judge who entered a ruling as a matter of law that the SRT members' off-duty training is compensable work within the parameters of the FLSA.

It is evident from the text of the decision that the concerns of the Eleventh Circuit reach much further than the confines of this individual case. However, such concerns cannot be addressed by virtue of inequitable jurisprudence. If the motivational force driving the reversal of this case on appeal is anything other than legally based, the judicial system cannot be used as a mechanism to facilitate such a remedy. Although the potential ramifications of an award in favor of the Plaintiffs in this case are clear, this issue must be addressed so as to provide guidance to both employees and employers as to their corresponding rights and obligations in the work arena. The method for addressing such concerns is not through diminishing the significance of a trial by jury and minimizing the role of the judge so as to reach the desired conclusion inconsistent with acceptable procedure and the current state of the law.

CONCLUSION

The present case is illustrative of the confusion and inconsistency pervasive throughout the federal circuits pertaining to the procedure for determining the eligibility of claims asserted under

the FLSA. This confusion and inconsistency is a result of a lack of guidance as to what constitutes "work" for purposes of triggering the protections afforded under the FLSA. Without such a starting point, it is virtually impossible to fashion a uniform procedure for the analysis as to whether a particular set of facts constitutes "work" in FLSA cases. These inherent problems are further manifested in the realm of the distinction between the role of the jury as the fact finder and the role of the judge as the decider of law. Without a clearly delineated process for determining the existence of "work," the role of the judge and the jury become obscured, the potential for the preclusion of the right to a trial by jury is manifested, and the notion of *stare decisis* is placed in jeopardy. The lack of distinction between questions of fact and questions of law is additionally exacerbated by the inability to delineate whether the asserted errors should be evaluated under the *de novo* or clearly erroneous standard of review.

The lack of a uniform standard for determining whether a particular set of facts constitutes "work" for purposes of the FLSA frustrates the sound and efficient administration of justice. The existence of conflict among the circuits and varying interpretations of decisions of this Court are further illustrations of the judicial inefficiency which has resulted from this void. As such, this matter raises a question of general importance with far-reaching ramifications for employers and employees in the work sector. There is a dire need for guidance in the form of binding authority as to the manner in which "work" should be defined and the process for determining its existence in FLSA cases.

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A

124 F.3d 1380

DADE COUNTY, Florida, A Political Subdivision, Petitioners-Appellants,

Florida Sheriff's Association, Amicus Curiae,

v.

Jose ALVAREZ, Andrew Benjamin, et al., Respondents-Appellees.

No. 96-4470

United States Court of Appeals
Eleventh Circuit

Oct. 16, 1997.

Current and former police officers sued county for unpaid overtime under the Fair Labor Standards Act (FLSA). The United States District Court for the Southern District of Florida, No. 94-636-Civ-Atkins, C. Clyde Atkins, J., entered judgement for officers. The Court of Appeals granted petition for leave to file interlocutory appeal and, per Kravitch, Senior Circuit Judge, held that physical training conducted by officers to maintain physical fitness standards mandated by police department was not compensable work under FLSA.

Reversed and remanded.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON, Circuit Judge, and KRAVITCH and WOOD*, Senior Circuit Judges.

KRAVITCH, Senior Circuit Judge:

Several current and former members of the Metro-Dade Police Department's Special Response Team ("SRT") brought this action against Dade County (the "County") under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, ("FLSA" or the "Act"), to recover overtime pay for off-duty hours spent performing physical fitness training. After a jury verdict in their favor, the district court entered judgement for the SRT officers. Because we conclude

that physical training conducted off-duty by SRT officers in order to maintain physical fitness standards mandated by their employer is not compensable work within the meaning of the FLSA, we reverse the judgement of the district court.[1]

I.

The SRT is a specialized unit of the Metro-Dade Police Department that assists police department personnel and other government agencies during potentially life-threatening situations. Its officers are highly trained in the use of special weapons, equipment, and techniques designed to minimize the risk of harm to officers and civilians in situations involving barricaded subjects, snipers, hostages, riots or other similar civil disturbances, and high-risk search and arrest warrants. Because SRT call-outs often require extreme physical exertion, involve serious risk to human life, and can last as long as twenty-four hours, "[g]ood physical fitness is recognized as a vital and necessary quality for individuals assigned to SRT."[2]

For this reason, the County requires SRT officers to be in excellent physical condition. Prospective SRT personnel must pass a physical fitness examination before enrolling in the SRT training school. At the training school, SRT trainees undergo rigorous cardiovascular and strength training. Once members of the SRT, officers are frequently monitored to ensure that they are physically capable of performing SRT functions. Until recently, SRT supervisors tested the cardiovascular condition and strength of incumbent officers twice a year, and officers who failed this fitness examination were subject to reassignment outside the SRT.[3]

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[1] Appellees' motion to strike portions of appellees' reply brief, previously carried with the case is denied.

[2] Plaintiffs' Ex. 21: 2-16 ("Metro-Dade Special Response Team, Standard Operating Procedures, September, 1990.").

[3] The test included: running 1.5 miles in 12 minutes or less; completing 4 pull-ups while wearing 25 pounds of weight; completing 50 sit-ups in two minutes or less; bench pressing body weight plus 25 pounds; completing a hand grip test of a minimum of 125 pounds; and doing 50 push-ups. Officers who failed the

At the time this lawsuit was filed in April 1994, SRT officers rotated between two weeks on primary status, during which they trained in SRT tactics and responded to calls for SRT assistance, and two weeks on warrant status, in which they served felony arrest warrants on high-risk individuals.[4] When on primary status, SRT officers were allotted two hours of on-duty physical fitness training each day, which they used to conduct long-distance runs, weight training, and calisthenics.[5] Prior to 1990, SRT members also were permitted to train on-duty twice a week for two hours during the warrant cycle. Since 1990, however, the SRT has not allotted any on-duty physical training time for officers on warrant status.[6]

Notwithstanding the restriction on on-duty training during the warrant cycle, SRT officers were expected to maintain their physical conditioning at all times. SRT supervisors instructed officers that they had to stay in shape regardless of whether they had adequate on-duty training time. For example, one SRT officer testified: "I have been told by my supervisors that it would be necessary and beneficial to me to work out in an off-duty status to maintain my physical fitness to get the job done."[7] An SRT Team Leader testified that he told his officers that they "had to continue to do their physical training whether they had the time on duty, and if they didn't...that they would have to do it on their own

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test were given thirty days of remedial training to regain the required level of physical conditioning. In the summer of 1995, the SRT eliminated the semi-annual fitness exam, and the SRT team leaders now evaluate SRT officers' physical fitness as part of a general monthly evaluation.

[4] In June 1994, the County changed the rotation so that SRT officers now alternate between three weeks on primary status and one week on warrant status.

[5] Due to emergency call-outs, SRT officers often were not able to use all of their on-duty physical training time.

[6] On occasion, SRT officers are pulled from the warrant cycle to perform primary status duties. In such cases, the officers may have the opportunity to conduct physical training on duty.

[7] R: 12-180.

time." [8] Other officers testified that off-duty training during the warrant cycle was necessary to maintain the level of fitness required for the job. In addition, expert witnesses testified that off-duty training was necessary during the warrant cycle because, without it, officers would suffer de-training and lose the endurance and performance abilities necessary for the SRT assignment.

Although SRT supervisors instructed officers to do whatever was necessary to maintain adequate cardiovascular and strength levels for the SRT assignment, they never directed officers to engage in any specific off-duty routine or training. The County required only that the officers remained in adequate shape to perform SRT functions and pass the physical fitness exam. The method, location, and amount of off-duty training were left to the officers' complete discretion. As one officer testified: "We are not told that we have to do weight training or we have to do running off-duty."[9] Another stated: "Off duty I train when I like, where I like, as long as I like, with in the back of my mind the importance of getting my job done."[10]

II.

Appellees brought this action alleging, *inter alia*, that the County violated the FLSA by refusing to compensate them for the hours they spent exercising off-duty.[11] At the conclusion of trial, the district court submitted a special verdict to the jury, which made the following factual determinations:

1. Plaintiffs' off-duty physical training or exercise is required or controlled by the County;

2. Plaintiffs' off-duty physical training or exercise is performed predominantly for the benefit of the County;

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[8] R: 12-201.

[9] R: 12-45.

[10] R: 12-181.

[11] Appellees also alleged, and the district court determined, that the County violated their Collective Bargaining Agreement ("CBA") by failing to pay them for off-duty training and violated the FLSA and the CBA by not compensating them for overtime hours worked in SRT training schools and courses.

3. Plaintiffs' off-duty physical training is an integral and indispensable part of their principle activities as SRT officers; and

4. Dade County either knew, or showed reckless disregard, that its conduct violated the FLSA.

The district court then entered judgement for appellees, concluding that SRT officers' off-duty physical training is compensable work under the FLSA and that the County willfully violated the Act. After denying the County's renewed motion for judgement as a matter of law made pursuant to Fed.R.Civ.P. 50(b), the district court certified for immediate appeal the question of whether appellees' off-duty exercise constitutes compensable work under the FLSA.[12] We granted the County's petition for leave to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

[1-3] We review the district court's denial of the County's renewed motion for judgement as a matter of law *de novo*, applying the same legal standard as the district court. *Shukla v. BP Exploration & Oil, Inc.*, 115 F.3d 849, 851 (11th Cir.1997). The question of whether a particular set of facts and circumstances constitutes work under the FLSA is a question of law. *Birdwell v. City of Gadsden, Ala.* 970 F.2d 802, 807 (11th Cir.1992). As we stated in *Birdwell*, "[i]t is for the court to determine if a set of facts gives rise to liability; it is for the jury to determine if those facts exist." *Id.* at 808. The County is thus entitled to judgement as a matter of law if the facts, as interpreted in the light most favorable to the SRT officers, afford no basis for finding that their off-duty exercise constitutes work for the purposes of the FLSA.

III.

[4] Congress enacted the FLSA in 1938 to "guarantee either regular or overtime compensation for all actual work or employment." *Tennessee Coal, Iron & R.. Co. v. Muscoda Local No. 123*,321 U.S. 590, 597,64 S.Ct. 698, 88 L.Ed. 949 (1944). The FLSA generally requires

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12 The parties agreed to bifurcate the issues of liability and damages, and the district court stayed the resolution of damages pending the outcome of this appeal.

employers to pay overtime for "employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which [the employee] is employed." 29 U.S.C. § 207(a)(1). By not providing a definition of "work" or "employment" in the FLSA, Congress left it to the courts to determine which employment-related activities are compensable under the Act.

[5,6] Generally, courts have construed work to mean all activities "controlled or required by the employer and pursued necessarily and primarily for the benefit of his employer and his business." *Muscoda*, 321 U.S. at 598, 64 S.Ct. at 703 (holding that underground travel to iron ore mines was compensable work). Whether an off-duty activity is conducted predominately for the benefit of the employer depends on the degree to which an employee's freedom is undermined by the work-related activity. "[I]t is clear that an employee's free time must be severely restricted for off-time to be construed as work time for purposes of the FLSA." *Birdwell*, 970 F.2d at 810 (holding that on-call waiting time was not compensable because "detectives' off-time was not so restricted that it was not used predominately for their benefit"); *see also Avery v. City of Talladega, Ala.* 24 F.3d 1337, 1347 (11th Cir.1994) (holding that meal time was not compensable because officers "are free to spend their meal breaks in any way they wish so long as they remain in uniform, leave their radios on, and do not leave the jurisdiction").

[7] The Portal-to-Portal Act, 29 U.S.C. §§ 251, *et seq.*, further provides that no employer shall be liable under the FLSA for activities which are "primarily to or post-liminary to" the principal activity or activities which the employee is employed to perform. 29 U.S.C. § 254(a)(2). Activities performed before or after the regular work shift are thus compensable under the FLSA only if they "are an integral and indispensable part of the principal activities for which covered workmen are employed." *Steiner v. Mitchell*, 350 U.S. 247, 256, 76 S.Ct. 330, 335, 100 L.Ed. 267 (1956) (holding that showering and clothes-changing by workers using caustic and toxic materials

were compensable activities).

The Department of Labor has issued regulations to apply these general principles in the specific context of employment-related training activities. Under these regulations, training programs need not be counted as working time if: (1) attendance is outside the employee's regular working hours; (2) the employee does not perform productive work during the program; (3) attendance is voluntary; and (4) the program is not directly related to the employee's job. *See* 29 C.F.R.§ 785.27; *see also Price v. Tampa Elec. Co.*, 806 F.2d 1551 (11th Cir.) (*per curium*) (applying § 785.27), *cert. denied*, 483 U.S. 1006, 107 S.Ct. 3230, 97 L.Ed.2d 736 (1987).

Applying these regulations in another case involving physical fitness training performed by a police department's SRT, the Department of Labor Wage and Hour Administrator (the "Administrator") concluded that off-duty training does not qualify as a compensable training activity. *See* Opinion Letter of the Wage and Hour Administrator, Maria Echaveste (June 1, 1994). In that case, the SRT officers, like appellees, were tested semi-annually to ensure that they could continue to meet the physical fitness standards required by their job. They also contended that a certain amount of off-duty training was required to maintain these standards. Nonetheless, the Administrator concluded that the off-duty training was not shown to be "required or directly related to the SRT job. Such physical training is of a general nature that is beneficial to any individual, whether or not he or she is an SRT officer." *Id.* at 2. The Administrator therefore ruled that the off-duty physical training did not constitute working time within the meaning of § 785.27, and thus was not compensable under the FLSA. Accord Opinion Letter of the Wage and Hour Administrator, No. 1589 (September 12, 1985) ("Time voluntarily spent by police and fire fighters to maintain their physical fitness is not considered working time, even though fitness is a job requirement.").

[8] The Administrator's application of the training regulations to the question of off-duty exercise provides us with valuable guidance for

judging the facts before us. "[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon courts by reason of their authority, do constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance." *Skidmore v. Swift Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944); *see also Townsend v. Mercy Hospital of Pittsburgh*, 862 F.2d 1009, 1012 (3d Cir. 1988) ("Although we are not bound by opinions of the Wage-Hour Administrator, the Administrator's expertise acquired through day-to-day application of the statute makes us hesitant to contravene such opinions unless the statute plainly requires otherwise.") (citing *Skidmore*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124).

[9] After carefully analyzing the factual record in this case in accordance with the regulations issued by the Department of Labor, we conclude that the off-duty time spent by the SRT officers maintaining their physical fitness standards mandated by their job is not compensable work within the meaning of the FLSA. First, there is no dispute here that the officers' off-duty fitness training was conducted outside of their regular working hours. Second, it is clear that the officers did not perform any productive work while conducting off-duty physical training. SRT officers are employed to respond to potentially life-threatening situations, and no such work was undertaken while they were exercising.

Third, the officers' off-duty training satisfies the voluntariness requirement of § 785.27. The SRT supervisors required only that the officers pass the semi-annual fitness test. Appellees presented no evidence that they were required to spend a specific amount of time training or to perform certain exercise routines during their off-duty hours. Moreover, appellees did not suggest that their employment would be adversely affected if they did not participate in any particular off-duty activities, as long as they could pass the fitness tests. In conducting off-duty exercise, SRT officers were free to train at any location, at any time, and for any duration. Given the freedom the officers enjoyed

in selecting their off-duty activities, we conclude that the actual off-duty physical training performed by individual officers was voluntary within the meaning of the regulations.

Finally, we conclude that the officers' off-duty physical training was not directly related to their SRT employment. In this case, the officers' physical fitness training was necessary to maintain a level of physical conditioning that each SRT officer already had attained. The County, by administering the semi-annual fitness exam, required only that the officers sustain the level of physical fitness established during the SRT training school and further developed during the primary cycle's on-duty cardiovascular and strength training activities. The County did not require the officers to acquire or develop a skill unique to their employment as SRT officers. Although physical training allows SRT officers to perform their core employment function of responding to emergency situations, such training also provides the individual officers with benefits that extend beyond their employment function. The mere fact that fitness training must be undertaken off-duty in order to perform SRT functions is insufficient to establish that such activity is directly related to the employee's job. Because the SRT officers' off-duty fitness training satisfies all of the four criteria listed in the regulations, we conclude that the officers' off-duty training need not be counted as working time.

The conclusion we reach by applying the Department of Labor's regulations is identical to the result suggested to us by the more general principles that courts have used to define work under the FLSA. In this case, SRT officers had complete freedom to define an off-duty physical training regimen. The sole limitation placed upon the officers by the County was that they maintain the level of physical conditioning required by the job of the SRT officer. This single requirement did not severely restrict the freedom of SRT officers, all of whom were active and physically fit when they applied for a position with the team. Moreover, maintaining proper physical fitness benefits individual officers in various ways that are separate from

their SRT employment. Given the flexibility afforded SRT officers in conducting off-duty fitness training and the personal value of such exercise, we conclude that the off-duty exercise performed by individual officers — whether at home, at a private gym, or at a county facility — cannot be considered to have been performed predominately for the benefit of the County.

Similarly, the off-duty training of the SRT officers cannot be said to be an integral and indispensable part of the principal activity for which these officers are employed. SRT officers are not employed to conduct physical training or even to attain certain physical fitness standards. Rather, SRT officers are employed to provide rescue services during potentially life-threatening situations. The mere fact that a high level of physical conditioning is necessary to perform these services does not transform off-duty exercise into work for purposes of the FLSA. We therefore conclude, as a matter of law, that off-duty physical training mandated by the SRT's job requirements does not constitute compensable work under the Act.

IV.

Accordingly, the judgement in favor of appellees is REVERSED, and this case is REMANDED to the district court for entry of judgement in favor of appellant.

REVERSED and
REMANDED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-4470

DADE COUNTY, FLORIDA,
A POLITICAL SUBDIVISION,

Petitioners-Appellants,

FLORIDA SHERIFF'S ASSOCIATION,

Amicus Curiae,

versus

JOSE ALVAREZ, ANDREW BENJAMIN,
TED BRADLEY, PETER CARODDO,
PAUL CHAHAL, et al.,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

BEFORE: EDMONSON, Circuit Judge, KRAVITCH and WOOD*,
Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the Respondents is, denied.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
96-4470

DADE COUNTY FLORIDA,
A POLITICAL SUBDIVISION,
Petitioners-Appellants,

FLORIDA SHERIFF'S ASSOCIATION,
Amicus Curiae,

versus

JOSE ALVAREZ, ANDREW BENJAMIN,
TED BRADLEY, PETER CARODDO,
PAUL CHAHAL, et al,
Respondents-Appellees,

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: EDMONSON, Circuit Judge, KRAVITCH and WOOD*, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____ ORD-42
UNITED STATES CIRCUIT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case 94-636-CIV-ATKINS

JOSE M. ALVAREZ et al.,

Plaintiffs,

vs.

DADE COUNTY, FLORIDA,
a political subdivision,

Defendant.
_____/

CORRECTED FINAL JUDGEMENT AS TO LIABILITY

This action came on for trial before the Court and a jury, Honorable C. Clyde Atkins, District Judge, presiding, and the issues having been duly tried and the jury having made the following factual determinations:

1. Plaintiffs' off-duty physical training is required or controlled by the County;

2. Plaintiffs' off-duty physical training is performed predominantly for the benefit of the County;

3. Plaintiffs' off-duty physical training is an integral or indispensable part of their principal activities as SRT officers;

4. Dade County either knew, or showed reckless disregard, that its conduct violated the FLSA.

It is ORDERED AND ADJUDGED

(1) Plaintiffs' off-duty physical training is compensable work as that term is contemplated under the Fair Labor Standards Act, 29 U.S.C.§ 201 *et sec* (FLSA).

(2) Defendant Dade County wilfully violated FLSA 29 U.S.C.§ 255.

(3) The Court finds that the County has violated the collective bargaining agreements entered into between the Police Benevolent Association and the County by failing to pay Plaintiffs for their off-duty physical training.

(4) The County has also violated the FLSA in failing to properly compensate Plaintiffs for overtime hours worked in SRT training schools and courses.

(5) By not properly compensating Plaintiffs for overtime hours worked in SRT training schools and courses, the Court also finds that the County has breached its obligations under the collective bargaining agreements.

(6) Plaintiffs are entitled to a three (3) year statute of limitations for recovery of unpaid wages under the FLSA 29 U.S.C. § 255.

(7) The Court also finds that Defendant did not act in good faith in its refusal to consider Plaintiffs' exercise compensable. The jury's verdict of wilfulness on the part of Defendant, in fact, precludes this Court from finding good faith. Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1561 (11th Cir. 1988) ("under the Thurston definition to find 'good faith' after a finding of 'wilful' violation is illogical; the two terms are now mutually exclusive."); Glenn v. General Motors Corp., 841 F.2d 1567, 1573 n. 14 (11th Cir.), cert. denied, 488 U.S. 948 (1988). As a result, Plaintiffs' will be entitled to liquidated damages once damages are determined.

(8) The issue of an award of attorneys' fees and costs will not be addressed until after a final disposition of this case has been reached. As such, Plaintiffs need not file a motion, nor prepare affidavits pursuant to Local Rule 7.3 until such time as the Court issues a final dispositive judgement closing the case.

The Corrected Final Judgement as to Liability being filed today, shall not be considered a dispositive order pursuant to Local Rule 7.3.

DONE AND ORDERED at Miami, Florida, this 29th day of January, 1996.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOSE M. ALVAREZ, et al.,

Plaintiffs,

vs. Case No. 94-636-CIV-ATKINS

DADE COUNTY, FLORIDA,
a political subdivision,

Defendant,
_____/

ORDER GRANTING PLAINTIFFS' MOTION FOR ENTRY OF JUDGEMENT AS TO LIABILITY ON COUNTS II, III, & IV OF THE SECOND AMENDED COMPLAINT

THIS MATTER is before the Court on Plaintiffs' above-referenced motion. Although Plaintiffs never referred to the motion as such, this Court treats the motion as one pursuant to Federal Rule of Civil Procedure 59(e). Using this rule as a guide, the Court notes that the motion was timely filed. The Court also notes that Defendant does not object to the entry of judgement. As a result, it is,

ORDERED AND ADJUDGED:

(1) Plaintiffs' Motion for Entry of Judgement as to Liability on Counts II, III & IV of the Second Amended Complaint is GRANTED.

(2) The Court will immediately file a Corrected Order of Final Judgement which will supersede this Court's Order of Final Judgement of November 27, 1995.

DONE AND ORDERED at Miami, Florida, this 29th day of January, 1996.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA-

Case No. 94-636-CIV-ATKINS

JOSE M. ALVAREZ, et al.,
Plaintiffs,

vs.

DADE COUNTY, FLORIDA,
a political subdivision,
Defendant.
_____/

ORDER DENYING DEFENDANT DADE COUNTY'S MOTION FOR SUMMARY JUDGEMENT ON COUNTS ONE AND TWO OF THE SECOND AMENDED COMPLAINT

THIS MATTER is before the court on Defendant Dade County's Motion for Summary Judgement on Counts One and Two of the Second Amended Complaint (D.E. 38). After careful consideration of the motion, response, reply, and all the attachments, it is

ORDERED AND ADJUDGED that the motion is DENIED.

Discussion

Introduction

Plaintiffs are several members or former members of Dade County's Special Response Team ("SRT"). They have sued Defendant Dade County ("Dade County" or "County") for unpaid overtime compensation for off-duty time spent in physical training or "working out." Count I alleges a violation of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 et seq. ("FLSA"). Count II alleges a breach of the Collective Bargaining Agreement ("CBA") governing the employment relationship between Plaintiffs and Defendant.

Defendant Dade County has moved for summary judgement, contending that, as a matter of law, Plaintiffs' physical activity engaged in while off-duty does not constitute "work" under the FLSA, nor was it "authorized" under the CBA; therefore, that time is not compensable. Plaintiffs respond by claiming that Dade County requires them to engage in such physical training in off-duty hours in order to maintain a level of physical fitness necessary to remain on the SRT. Plaintiffs also claim that the off-duty work-out hours are spent primarily for the benefit of the County, not themselves. At the very least, Plaintiffs argue, there is a factual dispute as to these issues, precluding entry of summary judgement in favor of Dade County. The court agrees with Plaintiffs.

FACTS

As stated above, Plaintiffs are several members or former members of the SRT of the Metro-Dade Police Department. The SRT is a unit of police officers who are trained in team tactics using special equipment to deal with high-risk, often life-threatening, situations in law enforcement. It is undisputed that a certain level of physical fitness is necessary for individuals assigned to the SRT because the nature of the members' duties demands extreme physical exertion. To become a member of the SRT, one must demonstrate personal strength and endurance by passing a physical fitness test which includes: running 1.5 miles in 12 minutes or less; completing three pull-ups while wearing 25 pounds of weight; completing 50 sit-ups in two minutes or less; bench pressing body weight plus 25 pounds; completing a "grip test" of a minimum of 125 pounds; and, completing 50 push-ups.

Each member of the SRT must take and pass this same test two times each year. The police department gives the test semi-annually to verify maintenance of physical capability. If an SRT member fails the physical fitness test, he or she would be removed from the SRT.[1] The SRT is the only unit in the Metro-Dade Police Department which is required to meet and maintain a certain level of physical fitness.

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[1] To date, no member of the SRT has been removed from SRT duty for failure to pass the physical fitness test. However, the court is unsure whether this is because no member of the SRT has ever failed the test or whether the County has chosen not to fire a particular member for failing the test.

At the time this lawsuit was filed, SRT members served on two-week cycles. For two weeks a member would be on an SRT work cycle. During that cycle, members train in SRT tactics and respond to calls which require SRT attention. However, also during that cycle, SRT members are permitted and even expressly required to work out at the police department's fitness facility when not training in SRT tactics or responding to calls. SRT members are compensated for the time they spend working out while on-duty.

The next two-week cycle is the warrant cycle. During the warrant cycle, SRT members serve arrest warrants. SRT members are not permitted to work out on-duty while on the warrant cycle.

Dade County claims that it does not require Plaintiffs to train physically during their off-duty hours. Nor does Dade County "authorize" such off-duty training such that it would be compensable under the CBA.

Plaintiffs have submitted affidavits which state that they must engage in physical training in their off-duty hours in order to be able to perform their jobs as SRT members, as well as to pass the physical fitness test they are required to pass to remain on the SRT. See Plaintiffs' Exh. 2, 3. Plaintiffs are not compensated for this off-duty physical training.

Additionally, testimony from the Plaintiffs' expert witness indicates that in order to maintain the level of physical fitness necessary to pass the physical fitness test given to SRT members, SRT members must work out a minimum of four to six hours per week. Deposition of Edward Coyle, Ph. D. at p. 24-25. Without a minimum number of hours regularly spent on physical training, people who train physically go through "detraining." This entails a loss of aerobic capacity and increased fatigue. See Coyle Depo. at pp. 41-52. After a period of detraining, it may take much longer than two weeks to regain pre-detraining levels of fitness. Id. at p. 52; see also id. at p. 55.

Summary Judgement Standard

Under the Federal Rule of Civil Procedure 56, a party is entitled to judgement as a matter of law if there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). First, the moving party bears the

burden of identifying the portions of the record, including pleadings, depositions, admissions, answers to interrogatories, and affidavits, which demonstrate the absence of a genuine issue of material fact. Celotex Corporation v. Catrett, 477 U.S. 317, 323 (1986); Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 998 (11th Cir. 1992). Once the moving party meets this burden, it is the responsibility of the non-moving party to "go beyond the pleadings" by filing affidavits, depositions, answers to interrogatories, or admissions and pointing to specific facts which show there is a genuine issue of material fact. Tipton, 965 F.2d at 998.

In reviewing a motion for summary judgement, the court must consider all the evidence in the light most favorable to the non-movant. Earley v. Champion Int'l. Corp., 907 F.2d 1077, 1080 (11th Cir.1990). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. Clemens v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982). Finally, " [a] summary judgement may be improper even though the basic facts are undisputed if the parties disagree regarding the material factual inferences that properly may be drawn from these facts." Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co., 420 F.2d 1211, 1213 (5th Cir. 1969).

The FLSA

The FLSA provides that:

> [N]o employer shall employ any of his employees who in any work week is engaged in commerce or in the production of goods for commerce for a work week longer than 40 hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 1.5 times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). The Supreme Court has held that whether an activity constitutes compensable "work" under the FLSA is determined by whether the activity is required or controlled by the employer and whether the activity is engaged in primarily for the benefit of the employer. Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1943); see also Armour & Co. v. Wantock, 323 U.S. 126, 132-33 (1944).

Generally, "[W]hether a certain set of facts and circumstances constitute work for purposes of the FLSA is a question of law." Birdwell v. City of Gadsden, Ala., 970 F.2d 802, 807 (11th Cir. 1992) (citing Bright v. Houston Northwest Medical Center Survivor, Inc., 934 F.2d 671 (5th Cir. 1991)). Nevertheless, the particular set of facts and circumstances which may or may not constitute "work" must be determined by the fact finder. Id. at 808 ("Certain set of facts, if found by a fact finder, will give rise to liability under the FLSA while other sets of facts will not. It is for the court to determine if a set of facts give rise to liability; it is for the jury to determine if those facts exist.") (emphasis added).[2]

In this case, Defendant argues that the facts are undisputed. And, since whether physical exercise is work under the FLSA is a question of law, summary judgement is proper because physical exercise is not compensable work under the FLSA. The issue is not as simple as the Defendant makes it out to be.

As set forth above, whether an activity constitutes work involves an analysis of whether that activity is controlled or required by the employer and whether the employee engages in the activity primarily for the benefit of the employer. Defendant claims that it never required or controlled the off-duty exercise done by Plaintiffs. However, Plaintiffs have adequately rebutted that claim with affidavits and depositions. Plaintiffs attested that they must work out while off-duty to maintain the level of physical fitness required by Defendant. See Plaintiffs' Exh. 2,3. Further, Plaintiffs' expert testified that regular activity-- a minimum of four to six hours per week-- is necessary to maintain the level of physical fitness Plaintiffs are required to maintain. See Coyle Depo. at p. 24-25.

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[2] Birdwell clarifies those issues which present the questions of law versus those which present questions of fact under the FLSA. Prior to Birdwell, some courts held, based on Skidmore v. Swift & Co., 323 U.S. 134 (1944), that whether something constitutes work under the FLSA was always a question of fact, precluding summary judgment in every case. Birdwell merely clarified that this is not so; summary judgment is appropriate in certain circumstances. See 970 F. 2d at 807-08. However, summary judgment is not proper in every case. See id.

So, it is undisputed that Plaintiffs must pass, and keep passing, a physical fitness test in order to perform and keep their jobs. But, what is clearly disputed is whether requiring Plaintiffs to maintain a certain level of physical fitness inferentially requires Plaintiffs to work out while off-duty particularly during the warrant cycle when Plaintiffs are not permitted to work out while on-duty. Defendant says no, Plaintiffs say yes.

This is the precise situation in which the Birdwell court envisioned a fact finder determining whether a set of facts exists; does Defendant necessarily require Plaintiffs to exercise in off-duty hours because Defendant requires that Plaintiffs maintain a certain level of physical fitness? Because this set of facts is disputed, it is not possible for the court to rule as a matter of law that Plaintiffs' off-duty exercise is or is not compensable work under the FLSA. See Birdwell 970 F.2d at 807-08.

Similarly, there is a dispute of fact as to who is the primary beneficiary of Plaintiffs' off-duty workouts. Of course, Defendant claims, in a rather conclusory manner, that Plaintiffs exercise for their own primary benefit because it enhances Plaintiffs' own well-being, and because if they do not exercise and maintain their physical fitness, Plaintiffs may lose their jobs. On the other hand, Plaintiffs argue that the County is the primary beneficiary of their off-duty physical training because the County has placed a premium on having a physically fit SRT. Further, Plaintiffs work out on their own time so that they may perform their jobs as SRT members and so that they may pass the physical fitness test Defendant imposes on them. See Plaintiffs' Exh. 2,3. The court cannot resolve such a dispute over who benefits primarily from Plaintiffs' off-duty exercise on a motion for summary judgement; it would require determining facts and drawing factual inferences which is inappropriate at this stage of the proceedings. See Clemens, 684 F.2d at 1368-69; Lighting Fixture & Elec. Supply Co., 420 F.2d at 1213.

Consequently, the court will leave it to the jury to determine whether a particular set of facts exist in this case, i.e., whether Defendant requires Plaintiffs to work out on their own time and whether it is Defendant or Plaintiffs who benefit primarily from such workouts, before deciding whether those facts give rise to liability under the

FLSA.[3] Defendant's motion as to Count I is denied.

The CBA

The CBA which governs the employment relationship between the individual Plaintiffs and Defendant states that overtime pay is warranted for "work authorized to be performed" in excess of scheduled daily or weekly hours. Just as in the FLSA, "work" is not defined by the CBA. Neither is "authorized." However, Defendant has submitted testimony that in order to be "authorized" overtime work, the employer must assign the work and the employee must submit an overtime request form with a supervisory signature. If no form is submitted, the work is not considered authorized.

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[3] Defendant also argues that the case of Price v.Tampa Elec. Co., 806 F.2d 1551 (11th Cir. 1987) mandates summary judgment in its favor. Price dealt with an employee who claimed he was entitled to compensation for time he spent studying electronics at home. Applying a four part test delineated in Department of Labor "DOL" regulations, the court held in favor of the employer. Because (1) the employee's "attendance" was voluntary (the employer did not require him to study electronics to keep his current job), (2) the electronics material was not directly related to the employee's job, (3) "attendance" was outside regular working hours, and (4) the employee did not perform productive work while studying electronics, the employee was not entitled to compensation. Id. at 1552. Of importance to the Eleventh Circuit in Price was that the electronics courses the employee was studying were designed to help people attain higher positions than that held by the employee; he needed none of that information for his current job.

The Court finds that even if Price is applicable here, it does not require the court to find in Defendant's favor on summary judgment. First, as discussed above, there is a factual dispute as to the first prong of the test; a fact finder must demonstrate whether Defendant required Plaintiffs to work out on their own time so that they could keep their jobs. Further, it is not even contended that Plaintiffs worked out to advance in the police department, as was the case in Price. Rather, Plaintiffs claim they must work out on their own time to keep their current jobs. Second, the court would be hard-pressed to find that physical training is unrelated to Plaintiffs' jobs since Defendant requires them to train during on-duty hours. Because the court cannot find for Defendant as a matter of law on at least two of the Price factors, Price does not mandate summary judgment in this case.

Defendant also submits that the DOL issued an opinion which can be construed to say that the DOL considers "voluntary exercise at home" to not be compensable under FLSA. The court finds that the DOL opinion does not entirely support Defendant's position. It does not relate to SRT members who are required to pass a physical fitness test to maintain their jobs and who are compensated for working out during certain on-duty hours. Further, a DOL opinion is not binding on this court. Skidmore, 323 U.S. at 140.

Two things prohibit the court from deciding this issue on summary judgement. First, Plaintiffs have submitted evidence showing that other employees of Defendant have received overtime compensation without obtaining prior approval and submitting an approval slip. Additionally, the court cannot say that failure to follow a procedural requirement imposed by Defendant amounts to a total loss of a potential entitlement to overtime compensation under the CBA.

Second, and more importantly, parties cannot contract away FLSA rights; it would defeat the purposes of the statute. See Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981); Birdwell, 970 F.2d at 806; Wethington v. City of Montgomery, 935 F.2d 222, 229 (11th Cir. 1991). Therefore, if Plaintiffs are entitled to overtime for off-duty work-outs under the FLSA, the CBA cannot be construed to eliminate that entitlement. In other words, Plaintiffs' entitlement to overtime compensation under the CBA is partially dependent on whether Plaintiffs' physical training is compensable under the FLSA. Since whether Plaintiffs are entitled to compensation under the FLSA raises a factual issue, the court cannot determine the CBA issue as a matter of law.[4] Therefore, Defendant's motion as it relates to Count II is also denied.

DONE AND ORDERED at Miami, Florida, this 25th day of April, 1995.

SENIOR UNITED STATES DISTRICT JUDGE

[4] Though the two issues are related, the court is not ruling that a favorable determination for Defendant on the FLSA issue necessarily mandates a favorable decision for Defendant on the CBA issue. That is, of course, because the CBA could provide better terms for Plaintiffs than does the FLSA.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 94-636-CIV-ATKINS

JOSE M. ALVAREZ, et al.,

Plaintiffs,

vs.

DADE COUNTY, FLORIDA,
a political subdivision,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF THE DEPARTMENT OF LABOR'S DECISION DATED JUNE 1, 1994; GRANTING PLAINTIFFS' MOTION IN LIMINE AND DENYING PLAINTIFFS' MOTION FOR SANCTIONS

THIS MATTER is before the Court on Defendant's Motion for the Court to Take Judicial Notice of the Department of Labor's Decision Dated June 1, 1994, and Plaintiffs' related Motion in Limine and For Sanctions. After careful review of the filings and applicable case law, it is

ORDERED AND ADJUDGED that

(1) The Court will not take judicial notice of the Department of Labor's opinion letter, and Defendant's Motion to that effect is DENIED;

(2) Plaintiffs' Motion in Limine is GRANTED in that the

Department of Labor's opinion letter of June 1, 1994, is ruled inadmissible at trial;

(3) In all other respects, the Motion in Limine is DENIED;

(4) Plaintiffs' Motion for Sanctions is DENIED.

DISCUSSION

On October 4, 1995, Defendant, Dade County, submitted to the Court a copy of a Department of Labor opinion letter[1] which concludes that SRT members off-duty exercise does not constitute work under the Fair Labor Standards Act. Defendant, by motion, attempts to have the Court take judicial notice of that letter as being dispositive on an adjudicative fact under Federal Rule of Evidence 201. What that adjudicative fact is, Defendant has never fully articulated.

For purposes of this motion, the Court is assuming that the fact in question is the mere existence of the opinion. To that end, Defendant is correct that it is an adjudicative fact capable of being judicially noticed under FRE 201. However, Defendant has maintained a position throughout the course of this case that it is not relying on the existence of an administrative ruling for allegedly violating the FLSA. Further, Defendant has professed to the Court that it was not aware of the existence of the letter until, at the earliest, July 1995, and, to date, Defendant has not alleged that it altered or informed its actions in any way based on the existence of the decision. Defendant has utterly failed to present to the Court any basis for finding the letter relevant to this case. Thus, even if the Court could take judicial notice of the letter for the fact of its existence, it is wholly irrelevant to any issue at trial.

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[1] The Court notes that Dade County has referred to this letter as a "decision" of the Department of Labor. However, the express language of the letter seems to militate against referring to it as a "decision." It is a letter, responding to a fact-specific inquiry by unnamed parties, and is intended to answer questions posed by such parties. It does not appear to be the product of any type of hearing, or a decision on issues presented by two sides in a dispute. As such, the Court believes that the document is more properly entitled an opinion letter.

In the end, the Court is unconvinced that the Department of Labor's opinion letter is the type of evidence that was intended to be noticed under FRE 201, and is convinced that the relevance of the document to the issues at trial is nil. As such, the Court shall not take judicial notice of the letter, and, unless further development is had on this issue, will not allow the letter to be admitted at trial.[2]

Finally, Plaintiffs, in their opposition to the Motion for Judicial Notice, filed a motion for sanctions. As support for the motion, Plaintiffs allege that Defendant's counsel failed to disclose the existence of the Department of Labor letter even in the face of Plaintiffs' specific discovery requests. At a conference before this Court, Defendant's counsel, Carol Anderson, admitted that she was in possession of the document in July 1995, and did not turn it over until she received a "certified" copy of the letter in late September.

The only defense that Ms. Anderson has offered for her repeated and blatant violations of this Court's discovery order in failing to turn over the letter earlier, is that she believed that Plaintiffs had knowledge and access to a copy of the letter. Recently, Ms. Anderson supplied the Court with evidence that Plaintiffs' attorneys were involved in another case in which they were made aware of the letter's existence as early as July 1995. The Court accepts this as true. Nonetheless, the fact that Plaintiffs had knowledge of and access to the document does not relieve Ms. Anderson of her duty, under this Court's Discovery Order, and the Federal Rules of Civil Procedure, to timely disclose such evidence to the Plaintiffs.

In the end, however, the Court notes that this episode of finger pointing is only one in a seemingly endless display of failed cooperation and questionable legal maneuvering. It seems obvious that Plaintiffs were aware of the existence of the letter, and were merely waiting for an opportunity to pounce on Defendant's failure to disclose the document earlier. At the same time, Defendant has a duty to disclose such a document as soon as it is discovered, and does not have the right to wait until an "admissible" copy has been received. Since, in this Court's opinion, both sides seem guilty of playing games

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[2] In so far as this corresponds to Plaintiffs' Motion in Limine, that motion is considered granted.

on the issue of disclosure of this document, Plaintiffs' Motion for Sanctions is denied.[3]

DONE AND ORDERED at Miami, Florida this 2nd day of November, 1995.

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[3] The Court would like to acknowledge that, at times, both sides have cooperated with one another in stipulating to a large number of issues in preparation for trial. For instance, the Court is encouraged by the recent efforts of both sides to settle the issue of liability for training school overtime, before the beginning of trial. It is the Court's hope, and belief, that this professional spirit of cooperation will continue throughout the rest of the trial.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOSE M. ALVAREZ et al.,

Plaintiffs,

vs. Case No. 94-636-CIV-ATKINS

DADE COUNTY, FLORIDA,
a political subdivision,

Defendant.

_____/

ORDER GRANTING PLAINTIFFS' MOTION IN LIMINE

THIS MATTER is before the Court on Plaintiffs' Motion in Limine, dated November 2, 1995. After careful review of the Motion, and Defendant's Response, the Court concludes that Defendant cannot produce any relevant basis for allowing testimony of the physical requirements of other occupations or of the number of officers waiting to be appointed to the Special Response Team. Therefore, it is

ORDERED AND ADJUDGED that

(1) Plaintiffs' Motion in Limine is GRANTED in full.

DONE AND ORDERED at Miami, Florida, this 6th day of November, 1995.

_____
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOSE M. ALVAREZ et al.,

Plaintiffs,

vs. Case No. 94-636-CIV-ATKINS

DADE COUNTY, FLORIDA,
a political subdivision,

Defendant
_____/

ORDER FORMALIZING ORE TENUS
DISCUSSIONS AT TRIAL

THIS MATTER is before the Court sua sponte. During the course of trial, counsel for both parties have announced their stipulation that certain issues will not be submitted to the jury. This order merely wishes to formalize the Court's understanding of these stipulations in order to aid counsel. It is the Court's understanding that the following determinations have been made by counsel for both parties.

(1) If liability is found at this current trial, the parties agree that any issue of ultimate damages will be submitted to the Court without any presentation to a jury.

(2) The parties also agree that any damages relating to the "training school" issue will be submitted to the Court, and will not require any determination by a jury.

(3) Defendant has presented Plaintiffs with a settlement offer for training school damages. The Court has given Plaintiffs until November 28, 1995 to respond to that offer. The court requests that a courtesy copy of that response be submitted to chambers by that date.

DONE AND ORDERED at Miami, Florida, this 17th day of November, 1995.

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

JOSE M. ALVAREZ, et al.,
Plaintiff,
vs.

Case 94-636-CIV-CCA
MIAMI, FLORIDA

DADE COUNTY, FLORIDA,
a political subdivision,
Defendant.

NOVEMBER 17, 1995

TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE THE HONORABLE C. CLYDE ATKINS, SENIOR UNITED STATES DISTRICT JUDGE , AND A JURY
VOLUME VIII

Specifically Jury Instructions pp. 87-99.

THE COURT: Members of the jury, it is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case.

When I am finished, you will go to the jury room and begin your discussions -- what we call deliberations.

In deciding the case, you must follow and apply all the law as I explain it to you whether you agree with the law or not, and you must not let your decision be influenced in any way by sympathy or by prejudice for or against anyone.

A political subdivision such as Dade County and all other persons stand equal before the law and must be dealt with as equals in a court of justice.

Where Dade County is involved, of course, it may only act through people as its employees, and, in general, the county is responsible under the law for any of the acts and statements of its employees which are made within the scope of their duties as employees.

In your deliberations, you should consider only the evidence, that is, the testimony of the witnesses and the exhibits I have admitted in the record. But as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions which reason and common sense led you to make.

"Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove or disprove an ultimate conclusion.

Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls.

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say and how important that testimony was.

In making that decision, you may believe or disbelieve any witness in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

In deciding whether you believe or do not believe any witness, I suggest you ask yourself a few questions.

Did the person impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about?

Did the witness appear to understand the questions clearly and answer them directly?

Did the witness's testimony differ from other testimony or other evidence?

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact or whether there was evidence that at some other time the witness said or did something or failed to say or do something which was different from the testimony he or she gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it because people naturally tend to forget some things or remember other things inaccurately.

So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood and the significance of that may depend on whether he --- whether it has to do with an important fact or with only an unimportant detail.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field, one who is called an expert witness, is permitted to state his or her opinion concerning those technical matters.

Merely because an expert witness has expressed an opinion, however, does not mean you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Statements and arguments of counsel are not evidence in this case unless made as an admission or stipulation of fact. When attorneys on both sides stipulate or agree as to the existence of a fact, however, you must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as proved.

The burden is on the Plaintiffs in a civil action, such as this, to prove every essential element of their claim by a preponderance of the evidence. If the proof should fail to establish any essential element of

the Plaintiffs' claim by a preponderance of the evidence in this case, the jury must find for the Defendant as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence, when considered and compared with that opposed to it, as more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in this case has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

During the trial of this case, certain testimony has been presented to you by way of deposition consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case.

The testimony of the witness, who for some reason, cannot be present to testify from the witness stand, may be presented in writing under oath or on a video recording played on a television set. Such testimony is entitled to the same consideration and is to be judged as to credibility and weight and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present and had testified from the witness stand.

It is not necessary for every single affected employee to testify in order to prove a violation of the F.L.S.A. The testimony and evidence of representative employees may establish prima facie proof of a pattern and practice of the F.L.S.A. violations. Such representational testimony has been presented to you in this case and you would give no consideration to the fact that not every single Plaintiff testified in this case.

This case arises under the Fair Labor Standards Act, (F.L.S.A.), the federal law that provides for the payment of time-and-a-half overtime

pay. The Act requires an employer to pay its employees at a rate of at least one-and-one-half times their regular pay for time worked in excess of forty hours in one week. This is commonly known as time-and-a-half for overtime work. The Plaintiffs claim that the Defendant did not pay them the overtime pay required by law.

Plaintiffs claim that the county has violated the F.L.S.A. by failing to pay them for overtime hours they expend engaging in physical training. This physical training includes cardiovascular training and strength training. Plaintiffs claim that this physical training is required in order for them to do their jobs as S.R.T. operatives and to complete successfully the physical performance tests which the county required them to pass twice a year. Moreover, Plaintiffs claim that they perform this off-duty physical training primarily for the benefit of the employer.

Defendant denies that the Plaintiffs are entitled to overtime for their off-duty exercise, claiming that Plaintiffs off-duty exercise is neither required nor controlled by the County. The county further claims that this exercise is not performed predominately for the county's benefit and that Plaintiffs engage in off-duty exercise primarily for their own benefit.

Work under the F.L.S.A. includes all activities which are required or controlled by the employer and which are performed for the benefit of the employer.

The Plaintiffs, in order to prevail on their claim, must prove by a preponderance of the evidence: 1. That their off-duty physical training or exercise is required or controlled by the county; and 2. That their off-duty exercise is performed predominantly for the benefit of the county.

For an activity to be controlled by the employer, the employer must determine the type of activity that is performed and the time, place and manner in which the activity is performed.

An activity may be considered required by the employer if it suffered or permitted such activity to occur. Work is "suffered" or "permitted" when the employer knows or has reason to believe that an employee is or was working overtime and the activities performed are an

integral and indispensable part of the employee's principal activities. It is the responsibility of the employer to see that the activity is not performed if he does not want it to be performed.

The term "principal activity" includes all activities which are an integral part of performing the S.R.T. job, those clearly related activities which are indispensable to its performance and tasks incidental to them, as well as those activities made necessary by the nature of the work performed. An employee may engage in more than one principal activity during the workday. An activity need not predominate over all (other) activities to be considered a principal activity, nor must it occur during the normal working hours. The fact that an activity occurs at home or outside the workplace does not preclude that activity from being considered as a principal activity.

Activities which are an "integral or indispensable" part of the principal activity are those without which it would not be possible to carry out the principal activity to which they are related.

As was said earlier, it is not enough for the Plaintiffs to prove by a preponderance of the evidence the activity in question was controlled or required. You must also show that the activity in question was "predominantly for the benefit of the county." An activity is predominantly for the benefit of one party if it benefits that party more than the other. In determining whether an activity is predominantly for the benefit of the county, you must base your determination based on all the circumstances of the case as they have been presented.

Plaintiffs claim that the county acted willfully by failing to pay Plaintiffs for their off-duty physical training. In order to prove willfulness, Plaintiffs must show by a preponderance of the evidence that the county either knew or showed reckless disregard for the matter of whether its conduct was prohibited by law.

It is not enough for Plaintiffs to show that the county knew that F.L.S.A. was "in the picture."

One example where you may find willfulness would be where the employer has reason to believe or should have suspected that its policies may have been in violation of the F.L.S.A., but nonetheless refused to investigate the matter further. This example constitutes one

possibility where reckless disregard may be found. As always, however, the ultimate factual determination on this issue rests with you, the jury, and the above example should not be taken as any reflection on the conduct of the Defendant in this case.

Some reference to the collective bargaining agreement in the final argument was made. This matter is not an issue for your decision. The parties have stipulated that if Plaintiffs' physical training is determined to be "work" under the F.L.S.A., then it is also compensable work under the collective bargaining agreements.

Any verdict you reach in the jury room must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach an agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury.

While you are discussing the case, do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong, but do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are the judges, judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go into the jury room, you must first select one of your members to act as your foreperson. That foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience and I will read it to you now in its present form. It is entitled: Special verdict form. Please answer all of the following questions: We, the jury, return the following verdict:

1. The Plaintiffs' off-duty physical training or exercise - - is Plaintiffs' off-duty physical training or exercise required or controlled by the county? Answer yes or no, as your

unanimous decision may be.

2. Is the Plaintiffs' off-duty physical training or exercise performed predominantly for the benefit of the county? Answer yes or no, as your unanimous agreement may be.

3. Is the Plaintiffs' off-duty physical training or exercise an integral and indispensable part of their principal activities as S.R.T. officers? Answer yes or no, as your unanimous decision may be.

For the following question, and as an aid to the Court, please assume that the county has been found to have violated the F.L.S.A. in answering this question. The Court, in asking you to make this assumption, wishes to emphasize that it should in no way reflect a predisposition on the part of the Court to rule either in favor or against the County. This is to allow you to accurately answer the question:

4. Did the county know or show reckless disregard for whether its conduct was prohibited by the Fair Labor Standards Act? Answer yes or no, as your unanimous verdict may be.

You will take this verdict form to the jury room and when you have reached unanimous agreement in the manner in which I have just mentioned, you will have your foreperson fill in the verdict form, date and sign it and then return it to the courtroom.

If you should desire to communicate with the Court at any time, please write down your message or question and pass the note to the Marshal who will bring it to my attention. You will have some forms in the packet I am going to give you on which you should write your questions.. I ask you please, to use this form because we can respond to it in an area where the answer section is located, and we can also preserve it for the record.

I will proceed as promptly as possible whenever I receive such a question and either return the answer to you in writing in the form you have submitted to me, or having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, you should not tell me your numerical division at the time. . .

APPENDIX K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.

QUESTIONS POSED BY THE JURY
WHILE IN DELIBERATIONS

Judge Atkins /

DO NOT DESTROY

THE FOLLOWING QUESTION IS ASKED BY THE JURY:

DO ALL FOUR QUESTIONS ON THE SPECIAL VERDICT FORM HAVE TO BE ANSWERED ALL YES OR ALL NO. IF NOT, WILL THE OUTCOME BE AFFECTED?

11/17/95 _____
DATE FOREPERSON

ANSWER TO QUESTION POSED BY THE JURY:

Suggested Answer:

The questions should be considered separately and each answered "yes" or "no" as your unanimous decision requires.

The court will then utilize your answer in accordance with applicable legal principles.

_____ _____
DATE UNITED STATES DISTRICT JUDGE

APPENDIX L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOSE M. ALVAREZ et al.,

Plaintiffs,

vs. Case No. 94-636-CIV-ATKINS

DADE COUNTY, FLORIDA,
a political subdivision,

Defendant.
_____/

SPECIAL VERDICT FORM

Please answer all of the following questions.

We, the jury, return the following verdict:

1. Is Plaintiffs' off-duty physical training or exercise required or controlled by the County?

YES ___X___ NO_____

2. Is Plaintiffs' off-duty physical training or exercise performed predominately for the benefit of the County?

YES ___X___ NO_____

3. Is Plaintiffs' off-duty physical training or exercise an integral and indispensable part of their principal activities as SRT officers?

YES ___X___ NO_____

For the following question, and as an aid to the Court, please assume that the County has been found to have violated the FLSA in answering this question. The Court, in asking you to make this assumption, wishes to emphasize that it should in no way reflect a predisposition on the part of the Court to rule either in favor or against the County. This assumption is merely to allow you to accurately answer the following question.

4. Did the County know or show reckless disregard for whether its conduct was prohibited by the Fair Labor Standards Act?

YES ____X____ NO_____

SO SAY WE ALL this 17th day of November, 1995, in Miami, Dade County, Florida.

_____

SIGNATURE OF FOREPERSON

APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOSE M. ALVAREZ et al.,

Plaintiffs,

vs. Case No. 94-636-CIV-ATKINS

DADE COUNTY, FLORIDA,
a political subdivision,

Defendant.
_____/

FINAL JUDGEMENT AS TO LIABILITY

This action came on for trial before the Court and a jury, Honorable C. Clyde Atkins, District Judge, presiding, and the issues having been duly tried and the jury having made the following factual determinations:

1. Plaintiffs' off-duty physical training is required or controlled by the County;

2. Plaintiffs' off-duty physical training is performed predominantly for the benefit of the County;

3. Plaintiffs' off-duty physical training is an integral or indispensable part of their principal activities as SRT officers;

4. Dade County either knew, or showed reckless disregard, that its conduct violated the FLSA.

It is ORDERED AND ADJUDGED

(1) Plaintiffs' off-duty physical training is compensable work as that term is contemplated under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (FLSA).

(2) Defendant Dade County wilfully violated the FLSA. 29 U.S.C. § 255.

(3) Plaintiffs are entitled to a three (3) year statute of limitations for recovery of unpaid wages. 29 U.S.C. § 255.

(4) The Court, at this time, will not address the issue whether Dade County, although acting in wilful violation of the FLSA, may nonetheless have acted in "good faith." 29 U.S.C. § 260. To aid the Court in this matter, the Parties are ORDERED to submit to the Court, by December 15, 1995, written memorandum regarding their various positions on this issue. As a result, the Court reserves judgement whether Plaintiffs are entitled to liquidated damages.

(5) The issue of an award of attorneys' fees and costs will not be addressed until after a final disposition of this case has been reached. As such, Plaintiffs need not file a motion, nor prepare affidavits pursuant to Local Rule 7.3 until such time as the Court issues a final dispositive judgement closing the case. The Final Judgement as to Liability being filed today, shall not be considered a dispositive order pursuant to Local Rule 7.3.

(6) The trial for damages, including damages for training school hours, is set for the two-week calendar commencing February 20, 1996.

The call of the calendar will be held February 15, 1996 at 1:45 p.m.

DONE AND ORDERED at Miami, Florida, this 27th day of November, 1995.

APPENDIX N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOSE M. ALVAREZ et al.,

Plaintiffs,

vs. Case No. 94-636-CIV-ATKINS

DADE COUNTY, FLORIDA,
a political subdivision,

Defendant.
_____/

ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGEMENT AS A MATTER OF LAW AND GRANTING DEFENDANT'S MOTION FOR CERTIFICATION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

THIS MATTER is before the Court on Defendant's above entitled Motions. After careful review of the motions, Plaintiffs' responses, Defendant's reply, applicable case law and the entire file in the case, it is:

ORDERED AND ADJUDGED:

(1) Defendant's Motion for Judgement as a Matter of Law is DENIED;

(2) Defendant's Motion for Certification to Appeal Pursuant to 28 U.S.C. § 1292(b) is GRANTED;

(3) This matter is to be STAYED until resolution of the Appeal, or until further order of this Court.

DISCUSSION

Defendant, within the appropriate time and pursuant to Federal Rule of Civil Procedure 50(b), has filed a renewed motion for judgement as a matter of law. In that motion, Defendant urges the Court to rule, as a matter of law, that off-duty exercise is not work compensable under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.. The basis for this aspect of the motion, according to Defendant, is not that no reasonable juror could find for Plaintiffs, as is the usual form of argument in motions such as these. On the contrary, Defendant seems to admit, and voice substantial concern, over its belief that too many juries could find for Plaintiffs in like situations. As Defendant states, "If juries throughout the country are allowed to answer such questions, there would be no guarantee of consistency.... Major differences in employer costs could arise based solely on the unavoidable vagaries of the jury process."

The Court points out to Defendant that the alleged "unavoidable vagaries" of the jury system can not be, in any way, a basis for denying Plaintiffs judgement in this case. As triers of fact, juries must be given the opportunity to decide each case, as it is presented, and decide whether sufficient facts exist for the Court to consider whether a subject activity may be considered work under the FLSA. As such, the Court rejects this aspect of Defendant's argument.

Defendant also contends that it is entitled to judgement as a matter of law on the ground that, "whether a certain set of facts and circumstances constitutes work for purposes of the FLSA is a question of law...." Birdwell v. City of Gadsden, 970 F.2d 802 (11th Cir. 1992). Defendant argues that "[i]t is for the court to determine in the first instance if a set of facts give rise to liability." Id. at 809.

In effect, Defendant argues that the Court erred in refusing to grant its earlier motion for summary judgement. In this respect, this aspect of the motion may have been more properly entitled a motion to reconsider.

Regardless of whatever procedural vehicle may have been the most appropriate, this Court is confident that the motion should be denied. The Court determined, based on its interpretation of controlling case

law, that the proper procedure in this case was to submit to the jury certain factual issues. In particular, the jury was asked to consider whether:

1. Plaintiffs' off-duty physical training or exercise is required or controlled by the County;

2. Plaintiffs' off-duty physical training or exercise is performed predominantly for the benefit of the County;

3. Plaintiffs' off-duty physical training is an integral and indispensable part of their principal activities as SRT officer.

After a lengthy charging conference, both Defendant and Plaintiffs agreed to the form of special verdict. The jury answered affirmatively to the above three matters. Substantial evidence was produced at trial to allow the jury to adequately make these factual determinations. In particular, the testimony of Lieutenant Waller, Plaintiffs, experts on the issue of physical training, and substantial demonstrative exhibits, all provided sufficient bases for the jury to conclude as it did. The Court may not substitute its judgement of the facts for that of the jury, and as long as substantial evidence exists to support the jury's factual findings, the Court ~~must~~ not intervene.

Further, the Court is convinced that it properly applied the law in asking the jury whether certain facts existed. In this way the Court has completely satisfied the burdens imposed by Birdwell which provides that "it is for the jury to determine if...facts exist," sufficient for the ~~C~~court to determine liability. That is precisely the procedure utilized by the Court, and is entirely consistent with this Court's reading of its obligations under the law. For this reason, based on the factual determinations made by the jury, the Court concluded, as a ~~matter of~~ law, that Plaintiff's claim was compensable under the FLSA.

Defendant argues that "common sense and customary understandings of the sorts of activities that are normally considered compensable compel the conclusion that off-duty exercise is not work under the FLSA." The jury disagree with this "common sense" assumption, and as long as there was sufficient evidence to support the verdict, which there was, this Court will not upset the jury's findings.

The second portion of Defendant's motion asks this Court to grant judgement as a matter of law as to the issue of the County's wilfulness in violating the FLSA. This motion was made at trial, and the Court noted that the evidence on this issue was weak. Nonetheless, even where the evidence supporting a finding of wilfulness is weak, it is not the proper province of the district court to take that issue from the jury. The Court felt at the time, and the subsequent verdict has borne this out, that there was enough evidence to submit the issue to the jury.

Based on the above discussion, the Court DENIES Defendant's Motion for Judgement as a Matter of Law.

Since the Court will not grant Defendant's Motion for Judgement as a Matter of Law, on either the issue of liability or wilfulness, this Court must now face Defendant's request to have this issue certified to the Court of Appeals. Under 28 U.S.C. § 1292(b), this Court is empowered to certify Defendant to immediately appeal a denial of its motion to the Court of Appeals.

The standard for determining whether to certify is:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order...

This Court, in making its determination of the proper procedure to use in this case, understood at the time, as it does today, that substantial debate exists as to whether this procedure is appropriate given the

nature of claim. Based on current case law, and the direction of the Court of Appeals in Birdwell, this Court fashioned its procedure, and is confident that the procedure comports with applicable legal standards. Nonetheless, given that Birdwell did not unequivocally spell out the manner in which district courts were to separate factual determinations from legal, excluding damages issues, there is the possibility that other courts may decide this issue in other ways. As such, this Court concludes that "substantial ground for difference of opinion" exists.

The Court also notes that the damages phase of this trial will involve costly discovery procedures, and may involve substantial disagreement, and litigation, on the proper method for determining damages. Clearly, there exists substantial disagreement about the procedure to be used for calculating and proving damages.[1] For these reasons, the Court is of the opinion that certification for immediate appeal would "materially advance the ultimate termination of the litigation."

Finally, the Court notes that another case, very similar to this, has already been litigated in another court in this district. As a result of the decision in this Court, and that in other courts, it is quite likely that other agencies around the country may wish to bring similar suits. As a result, there can be little question that the issue presented in this litigation constitutes a "controlling question of law," as that phrase is contemplated in § 1292(b). See Abortion Rights Mobilization, Inc. v. Regan, 552 F. Supp. 364 (S.D.N.Y.).

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[1] Plaintiff has alleged that the issue of damages, in both amount and award, has been stipulated to by the Defendant. In support, counsel for Plaintiffs points to a letter, written by counsel, to Defendant, which states, "We have also agreed that there is no need to ask the jury about the reasonable number of hours of physical training required in light of the County's stipulation that each of the Plaintiff's will be entitled to receive pay for the actual number of hour(s) . . . he performed." Letter from Osnat K. Rind to Carol A. Anderson, November 2, 1995. In response to that letter, counsel for Defendant agreed that "We accept your statement of our agreement yesterday." However, counsel for Defendant went on to state that "This does not imply any present agreement to either an amount of damages . . . or a methodology for proving and calculating them." Letter from Carol A. Anderson to Osnat K. Rind, November 3, 1995.

For the preceding reasons, Defendant may apply for an interlocutory review of this Court's decision, pursuant to 28 U.S.C. § 1292(b).

DONE AND ORDERED at Miami, Florida, this 14th day of February 1996.

APPENDIX O

FEDERAL RULES CITED:

Federal Rules of Civil Procedure Rule 49 (a) provides in pertinent part:

> **Special Verdicts.**
> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence . . . The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue . . .

Federal Rules of Civil Procedure Rule 50 (b) provides in pertinent part:

> **Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial.**
> Whenever a motion for judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to the later determination of the legal question raised by the motion . . . Such a motion may be renewed by service and filing not later than 10 days after the entry of judgment . . . If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. . .

Federal Rules of Civil Procedure Rule 56 (c) provides in pertinent part:

> **Summary Judgment - Motion and Proceedings Thereon.**
> [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. . . .

APPENDIX P

STATUTES CITED:

United States Code, Title 28. JUDICIARY AND THE JUDICIAL PROCEDURE. Chapter 83 — Court of Appeals, Section 1292 (b), provides in pertinent part:

> **28 U.S.C. § 1292 (b). Interlocutory decisions.**
> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order . . .

United States Code, Title 29. LABOR. Chapter 8 - Fair Labor Standards, Section 201 provides in pertinent part:

> **29 U.S.C. § 201. Short title.**
> This chapter may be cited as the "Fair Labor Standards Act of 1938."

United States Code, Title 29. LABOR. Chapter 8 - Fair Labor Standards, Section 207 provides in pertinent part:

> **29 U.S.C. § 207. Maximum hours.**
> (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any work week is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed; . . .

United States Code, Title 29. LABOR. Chapter 9 - Portal-to-Portal Pay, Section 251 provides in pertinent part:

> **29 U.S.C. § 251. Congressional findings and declaration of policy.**
> (a) The Congress finds that the Fair Labor Standards Act of 1938, as amended (29 U.S.C.A. § 201 et seq.), has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers . . . the Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter be enacted.

United States Code, Title 29. LABOR. Chapter 9 - Portal-to-Portal Pay, Section 254 provides in pertinent part:

> **29 U.S.C. § 254. Relief from liability and punishment under Fair Labor Standards Act of 1938, Walsh-Healey Act, and Bacon-Davis Act for failure to pay minimum wage or overtime compensation.**
> (a) Activities not compensable. Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act, of 1938, as amended (29 U.S.C.A. §201 *et seq.*), the Walsh-Healey Act (41 U.S.C.A. § 35 *et seq.*), or the Bacon-Davis Act (40 U.S.C.A. § 276 a *et seq.*), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 -

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform; and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Compensability by contract or custom. Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either --

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

APPENDIX Q

REGULATORY PROVISIONS CITED;

Title 29 of the Code of Federal Regulations, Chapter V Part 785 - HOURS WORKED, Subpart A - General Considerations, provides in pertinent part:

> **29 C.F.R. § 785.1 Introductory statement.**
> . . . Section 7 of the Act [29 U.S.C. 207] provides that persons may not be employed for more than a stated number of hours a week without receiving at least one and one-half times their regular rate of pay for the overtime hours. The amount of money an employee should receive cannot be determined without knowing the number of hours worked. This part discusses the principles involved in determining what constitutes working time. It also seeks to apply these principles to situations that frequently arise. It cannot include every possible situation. No inference should be drawn from the fact that a subject or an illustration is omitted. If doubt arises inquiries should be sent to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210, or to any area or Regional Office of the Division.

> **29 C.F.R. §785.2 Decisions on interpretations; use of interpretations.**
> . . . The ultimate decisions on interpretations of the act are made by the courts. The Administrator must determine in the first instance the positions he will take in the enforcement of the Act. The regulations in this part seek to inform the public of such positions. It should thus provide a "practical guide for employers and employees as to how the office representing the public interest in its enforcement will seek to apply it." (*Skidmore v. Swift,* 323 U.S. 134, 138 (1944).)

29 C.F.R. § 785.3 Period of effectiveness of interpretations.
These interpretations will remain in effect until they are rescinded, modified or withdrawn. This will be done when and if the Administrator concludes upon reexamination, or in the light of judicial decision, that a particular interpretation, ruling or enforcement policy is incorrect or unwarranted. All other rulings, interpretations or enforcement policies inconsistent with any portion of this part are superceded by it . . .

Title 29 of the Code of Federal Regulations, Chapter V Part 785 - HOURS WORKED, Subpart B — Principles for Determination of Hours Worked, provides in pertinent part:

29 C.F.R. § 785.6 Definition of "employ" and partial definition of "hours worked."
By statutory definition the term "employ" includes (section 3(g)) "to suffer or permit to work." The act, however, contains no definition of "work." Section 3(o) of the Fair Labor Standards Act contains a partial definition of "hours worked" in the form of a limited exception for clothes changing and wash-up time.

29 C.F.R. § 785.7 Judicial construction.
The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business." (*Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123,* 321 U.S. 590 (1944)) Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays

a part in all employments in a stand-by capacity. . ." (*Armour & Co.*v. *Wantock,* 323 U.S. 126 (1944); *Skidmore* v. *Swift,* 323 U.S. 134 (1944)). The workweek ordinarily includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." (*Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946)). The Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities. See §785.34.

Title 29 of the Code of Federal Regulations, Chapter V Part 785 - HOURS WORKED, Subpart C - Application of Principles, Employees "suffered or permitted" to work, provides in pertinent part

29 C.F.R. § 785.11 General.

Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time. (*Handler* v. *Thrasher*, 191 F.2d 120 (C.A. 10, 1951): *Republican Publishing Co.* v. *American Newspaper Guild,* 172 F.2d 943(C.A. 1, 1949); *Kappler* v. *Republic Pictures Corp.,* 59 F.Supp. 112 (S.D. Iowa 1945), aff'd 151 F.2d 543 (C.A. 8, 1945); 327 U.S. 757 (1946); *Hogue* v. *National Automotive Parts Ass'n.,* 87 F.Supp. 816 (E.D. Mich. 1949); *Barker* v. *Georgia Power & Light Co.,* 2 W.H. Cases 486; 5 CCH Labor Cases, Para. 61,095 (M.D. Ga. 1942); *Steger* v. *Beard & Stone Electric Co., Inc.,* 1 W.H. Cases 593; 4 Labor Cases 60,643 (N.D. Texas, 1941))

29 C.F.R. § 785.12 Work performed away from the premises or job site.
The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.

29 C.F.R. § 785.13 Duty of management.
In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

Title 29 of the Code of Federal Regulations, Chapter V Part 785 - HOURS WORKED, Subpart C — Application of Principles, Preparatory and Concluding Activities, provides in pertinent part

29 C.F.R. § 785.24 Principles noted in Portal-to-Portal Bulletin.
In November, 1947, the Administrator issued the Portal-to-Portal Bulletin (part 790 of this chapter). In dealing with this subject, § 790.8 (b) and (c) of this chapter said:

(b) The term "principal activities" includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are found in the report of the Judiciary Committee of the Senate on the Portal-to-Portal bill. They are the following:
(1) In connection with the operation of a lathe, an employee will frequently, at the commencement of his workday, oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and compensable under the Fair Labor Standards Act, remains so under the Portal Act, regardless of contrary custom or contract.
(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

29 C.F.R. § 785.25 Illustrative U.S. Supreme Court decisions.
These principles have guided the Administrator in the enforcement of the Act. Two cases decided by the U.S. Supreme Court further illustrate the types of activities which are considered an integral part of the employees' jobs. In one, employees changed their clothes and took showers in a battery plant where the manufacturing process involved the extensive use of caustic and toxic materials. (*Steiner* v. *Mitchell,* 350 U.S. 247 (1956)). In another case, knife men in a

meat packing plant sharpened their knives before and after their scheduled workday (*Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956)). In both cases the Supreme Court held that these activities are an integral and indispensable part of the employees' principal activities.

Title 29 of the Code of Federal Regulations, Chapter V Part 785 - HOURS WORKED, Subpart C - Application of Principles, Lectures, Meetings and Training Programs, provides in pertinent part

29 C.F.R. § 785.27 General.
Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met: (a) Attendance is outside of the employee's regular working hours; (b) Attendance is in fact voluntary; (c) The course, lecture, or meeting is not directly related to the employee's job; and (d) The employee does not perform any productive work during such attendance.

29 C.F.R. § 785.28 Involuntary attendance.
Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.

29 C.F.R. § 785.29 Training directly related to employee's job.
The training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course

in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily in taking such a bookkeeping course, outside of regular working hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job. . .

29 C.F.R. § 785.30 Independent training.
Of course, if an employee on his own initiative attends an independent attends school, college or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job.

APPENDIX R

This is in further response to your inquiry concerning the application of the Fair Labor Standards Act (FLSA) to certain __ Police Officers who are members of the Police Department's Special Response Team (SRT). The issue of concern is whether time spent by SRT members in physical fitness training during off-duty hours is compensable under the FLSA. We regret the delay in responding to your inquiry.

An investigation of the __ Police Department under the FLSA focused on this issue. After reviewing the matter, Regional Administrator Buhl concluded that the off-duty physical training by SRT officers was not compensable in light of an opinion of September 12, 1985, issued by the Deputy Wage and Hour Administrator. That opinion took the position that police officers or firefighters who voluntarily spend time maintaining their physical fitness during off-duty hours do not have to be compensated for such time under the FLSA.

SRT officers have been recruited from the ranks of the Police Department in response to expressions of interest by individual officers. Among the minimum qualifications required for each individual is the ability to successfully complete and maintain physical agility standards. Officers must pass the physical agility test upon application for the SRT. Those officers selected for the SRT must pass this test again before they undergo FBI SWAT Team training. Thereafter, they are tested semi-annually to insure that they continue to meet such standards. Test minimums include 35 pushups, 60 sit-ups, 5 pull-ups, and the completion of a 2-mile run in 16 minutes (or 17 minutes for officers 35 years of age or older). However, other (non-SRT) officers do not have to meet such standards.

The labor agreement between the City and the police officer's union provides for certain minimum compensation when SRT offices are called out. In addition, SRT officers are compensated for the time spent in training required, except for the personal fitness training at issue. SRT officers contend that at least three hours of physical fitness training activity per week is required to maintain the fitness level mandated under the SRT test standards. According to the Chief of Police, there is no empirical evidence to support this contention, but he admits that this amount of time spent in fitness training would be reasonable to meet the standards as outlined above.

The Department of Labor's Interpretive Bulletin on hours worked, 29 CFR 785, defines in §§ 785.27-785.32 those circumstances under which attendance at "training" programs and similar activities need not be counted as working time under the FLSA. In general, as indicated in 29 CFR § 785.27, four criteria must be met: (a) attendance must be outside of the employee's regular working hours; (b) attendance must be voluntary; (c) the training must not be directly related to the employee's job; and (d) the employee must not perform any productive work during attendance.

Since the physical training has not been performed during duty hours, criterion (a) has been met. Obviously, the issue would be moot if the SRT officers were allowed time "on the clock" to maintain their physical abilities. Criterion (d) is also met since no police work is performed during physical training.

As to criterion (b) and (c), the information you have provided is not sufficient to demonstrate that the training is required or directly related to the SRT job. Such physical training is of a general nature that is beneficial to any individual, whether or not he or she is an SRT officer.

Thus, we are not prepared to assert that physical training time outside of duty hours is compensable under the FLSA. While such training benefits the employer, it is also of benefit to the employee whether or not the employee is an SRT officer. In our view the issue of concern could be addressed by the parties through the collective bargaining process.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that the above is responsive to your inquiry.

Sincerely, Maria Echaveste - Administrator

APPENDIX S

Metro-Dade Special Response Team
Standard Operating Procedures
September 1990

N. PHYSICAL/PSYCHOLOGICAL REQUIREMENTS

1. Good physical fitness is recognized as a vital and necessary quality for individuals assigned to SRT. Many responses demand extreme physical exertion to satisfactorily resolve the incident. Prospective SRT personnel will be required to pass physical fitness requirements for entry into the SRT Basic Certification Course (ANNEX D). Incumbent personnel are required to maintain a satisfactory level of physical fitness and will be tested semi-annually (ANNEX E). Personnel will be required to pass each test to remain an active tactical team member.

APPENDIX T

MEMORANDUM

TO:	DISTRIBUTION A	DATE:	September 6, 1990
FROM:	Fred Taylor, Director Metro-Dade Police Department	SUBJECT:	Fitness Facilities Guidelines

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The overall wellness level of our employees, especially sworn personnel, has been a concern of this Department for several years. Although fitness is an individual responsibility, the Department, after extensive research and consideration of other fitness programs, constructed, and in December 1989, opened the Department's multi-purpose Fitness Center. Since then several operating concepts and wellness/workout programs have been implemented and evaluated to determine the best operating guidelines. Additional guidance was received from GSA Risk Management, the County Attorney's Office, the Department's Legal Bureau, and Safety Officer regarding personal and departmental liability.

In reviewing the totality of these programs and the information obtained and to make the utilization of fitness facilities and training time equitable for all departmental personnel, the following guidelines will go into effect immediately:

1. All previous departmental on-duty pilot fitness programs; i.e., workout schedules of Professional Compliance Bureau, Warrants Bureau, Police Operations Section/Transit, etc., will be DISCONTINUED.

2. Utilization of any departmental or other fitness facilities, i.e., Headquarters Fitness Room, Training Bureau Fitness Center, Station Fitness Rooms, etc., will only be used during off-duty hours.

3. The single EXCEPTION will be the Department's Special Response Team (SRT), due to the nature of their assignment. SRT may participate in tactical/fitness training on-duty while in their two-week SRT tactical/training cycle. This does not include the two week warrant cycle.

Although the on-duty utilization of the Department's Fitness Facilities can no longer be approved, these facilities are available to assist each employee in their wellness goals. To further support this effort, an 8-hour Wellness Day is offered by the Training Bureau to evaluate and determine current fitness levels. With the assistance of a Fitness Center Wellness Coordinator or Station/Bureau Physical Fitness Instructor, a program for overall wellness can be established. Also, in the near future, on-duty classes/seminars in weight reduction, nutrition, stress reduction, and smoking cessation will be offered to supplement workout programs. All departmental employees are encouraged to participate.

The Department's workforce of the 1990s can be healthier than ever before, but it must also be a voluntary and individual effort.

APPENDIX U

MEMORANDUM

TO: Fred Taylor, Director
Metro-Dade Police
Department

DATE: July 12, 1993

VIA: Channels

SUBJECT: Special Response Team (SRT) Fitness Training

FROM: Jerry W. Burgin, Captain
Tactical Operations Section

Recommendation

It is requested that Special Response Team (SRT) personnel be allowed to train on-duty for 90 minutes, twice per week, at the Department's Fitness Center during their two-week warrant cycle. This would provide officers experiencing a problem maintaining a fitness program off-duty the opportunity to train regularly.

Background

On July 5, 1989, Dr. Paul Davis of ARA Human Factors published a final report on his study of job-related physical performance standards for the Department's Special Response Team and Canine Unit. As a result of that study, a new, more demanding physical fitness test was recommended and adopted. Recognizing the physical rigors inherent to SRT work, Dr. Davis recommended quarterly fitness assessments and monthly criterion task tests be conducted to ensure SRT officers maintain the level of fitness required to fulfill the physical demands of their position.

A memorandum dated September 6, 1990, outlining guidelines for the use of the Department's Fitness Center including authorization for SRT to train on-duty at the Center while in their two-week SRT tactical/training cycle (see Attachment #1). The authorization did not include the two-week warrant cycle worked by the officers. In order to maintain the required level of fitness identified in the study, SRT

officers have trained on their own time while in the two-week warrant cycle.

A problem, however, has been identified. While in the two-week tactical/training cycle, officers often miss opportunities to train as authorized, as matters of priority often consume time allocated for fitness training. Consequently, the officers quite often are required to train on their own time during the tactical/training cycle as well. This has caused a problem with officers who find it difficult, because of family obligations, to incorporate fitness training on a regular basis.

Mr. Richard Leitner, Director of the Metro-Dade Police Health and Fitness Center, was asked to comment on the effects irregular training has on a person's level of fitness when it involves extended periods of inactivity. In Mr. Leitner's written reply (Attachment #2), he quotes from a study done by Mr. Edward C. Coyle of the University of Texas at Austin, which reported that "...the reversibility concept holds that when physical training is stopped or reduced, the body readjusts in accordance with the diminished physiological demand, and the beneficial adaptations may be lost," and that, "...approximately half of the endurance training benefits may be lost if training is stopped for two weeks. Therefore, it is wise to minimize long lay-offs from training." What was most disturbing, however, was the study's conclusion that if after ten days of detraining a person attempts to resume normal training, it will require longer than ten days to return to trained levels; in fact, it was reported that it may take as many as 40 days of retraining to recover 97% of the previous level of aerobic fitness.

To allow SRT officers to train twice per week, regardless of work cycle status, would ensure maintenance of a level of fitness commensurate to that identified by Dr. Davis as required to adequately perform tactical law enforcement.

Commander Robert Lamont, Warrants Bureau, was briefed on the recommendation, and he advised he had no reservations about allowing SRT officers to train while in the two-week warrant cycle, provided it was controlled.

The availability of SRT personnel for warrant service would not be disrupted, as the scheduling of each two-man investigative team for

training would be staggered to ensure continuous coverage.

Any decrease in productivity would be negligible given the brief time to be allocated for training; however, any tangible decline in individual productivity would result in a suspension of the privilege for the officer until such time as the priority of warrant service was reestablished. The feelings expressed by the rank and file in SRT indicate that approval for this training while in warrants status would improve morale to such an extent that individual and unit performance would improve.

In conclusion, approval of the recommendation will in no way adversely affect the operation or efficiency of other units assigned to the Special Patrol Bureau. Each entity within the Bureau is unique and singularly independent in its mission, so there would be no peripheral impact on these other units.

APPROVED	DATE	DISAPPROVED
X	7-15-93	
R.D. McGee, Major Special Patrol Bureau		R.D. McGee, Major Special Patrol Bureau
T.H. Lamont, Chief Uniform Operation Bureau		T.H. Lamont, Chief Uniform Operations Bureau
Carlos Alvarez Assistant Director Police Services		Carlos Alvarez Assistant Director Police Services
Fred Taylor Director		Fred Taylor Director

APPENDIX V

MEMORANDUM

TO: Fred Taylor, Director
Metro-Dade Police
Department

DATE: April 28,1994

VIA: Channels

SUBJECT: Personnel Assignment
Proposal

FROM: R.D. McGee, Major
Special Patrol Bureau

Recommendation:
It is recommended that the current practice of alternating our Special Response Teams between warrant and SRT status every two weeks be discontinued.

Background:

In November 1987, our Tactical Operations Section, Special Response Team became a centralized unit. At the time, based on our limited calls for service, it was agreed that we would assist Warrants Bureau. This would occupy 50% of our available time.

Since that time, the four SRT teams alternate, two teams at a time, for two week periods between the Warrants Bureau, and active SRT status. During the two week period of warrant status, the teams are prohibited from training or maintaining physical fitness while on duty. All tactical training must take place during their two week period of active SRT status. Our calls for assistance have steadily increased. As of April 15, 1994, we are approximately 60% ahead of last year's calls. Based on increased demands, our ability to set time aside for training while in active SRT status has been adversely affected. It is estimated, our training time has decreased approximately 50%.

To perform the myriad of skills at the level of proficiency mandated by their assignment, our personnel must continually train. The entire SRT supervisory staff agrees that the gradual reduction in training

opportunities will eventually negatively impact the officers' performance during high profile missions.

The fact of the matter is that our contribution to the Warrants Bureau is minimal at best; over the preceding 12 month period, analysis of our Warrants Bureau activity indicates the following:

- Of the 3,043 Warrants received, 53% were recalled (warrants that were quashed or canceled, either prior to or after an investigation was initiated).

- 34% were investigated but no clearance could be made.

- Of the 3,043 warrants received, only 366 (13%) were actually served.

- Almost 30% of the time our personnel were assigned to warrants, had to be recalled to SRT status to supplement active teams.

The pending law suit regarding SRT personnel working out while in warrant status could be resolved if they were assigned to full time SRT duty.

Commander C. Thompson, of the Warrants Bureau, has been consulted in reference to this proposal. He indicated that the majority of warrants are closed by uniform officers on the street, and that our closure rate was average for that type of activity. Commander Thompson further indicated that there are so many outstanding warrants in Dade County, that the SRT activity has little effect.

Our Administrative staff would benefit from this proposal, as one secretary spends one third of her time dedicated to administrative warrant activity.

An alternative to the complete withdrawal of SRT personnel would be a phasing out process. One squad of SRT officers would be withdrawn from warrants duties and an evaluation of its effect on the Warrants Bureau could be conducted.

Based on that evaluation, the complete withdrawal could be instituted, one squad could remain, or the previous method could be reinstituted.

APPROVED	DATE	DISAPPROVED
X Jack E. Rafferty, Chief Uniform Operations Division	05/3/94	_____ Jack E. Rafferty, Chief Uniform Operations Division
X Carlos Alvarez Assistant Director Police Services	05/3/94	_____ Carlos Alvarez Assistant Director Police Services
X Fred Taylor Director	05/16/94	_____ Fred Taylor Director